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No. [redacted]

In the Supreme Court of the United States

MARGARET A. PENN,

Petitioner,

v.

LARRY A. BODIN, RICHARD ARMSTRONG, AND JOHN VETTLESON,

Respondents,

FRANK LANDEIS, SHERIFF FOR SIOUX COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), in an analysis supported by six justices, held that the Dawes Act, 25 U.S.C. §331, et seq. divested Indian tribes of the power to exclude non-members from their fees lands within reservations. *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978) held that tribes have no criminal jurisdiction over non-Indians. Margaret Penn, a non-Indian, was banished for fifty days from her home on fee land, located within the Standing Rock Sioux Reservation, pursuant to an *ex parte* tribal court order that was served and enforced, under threat of arrest, by a federal BIA officer and a county sheriff. The questions presented are:

1. Do a BIA officer and a county sheriff enjoy absolute immunity when enforcing an *ex parte* tribal court order banishing a non-Indian from her home on fee land, all other fee lands and public highways within a reservation?

2. Are a BIA officer and a county sheriff entitled to absolute immunity when enforcing a tribal court banishment order against a non-Indian when the officers threaten arrest, since the BIA officer had no authority to arrest a non-Indian, the county sheriff had no authority to enforce a tribal court order, and the federal statutory authority for enforcement of tribal court orders provides that such enforcement by the BIA officer is "subject to federal law" and the enforcement violates federal law?

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PETITION FOR A WRIT OF CERTIORARI

Margaret A. Penn respectfully petitions for a Writ of Certiorari to review the Order granting summary judgment to the BIA officers and county sheriff in their individual capacity entered by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals (App., *infra*, 1a-9a) is reported at 335 F.3d 786 (8th Cir. 2003). The Eighth Circuit Court of Appeals subsequently denied the Petition for Rehearing and for Rehearing En Banc on September 11, 2003

(No. 02-1731, 02-2267) (App., *infra*, 31a). The opinion of the District Court for the District of North Dakota (Case No. A1-00-93, March 6, 2002) (J. Conmy) (App., *infra*, 10a-17a), which was reversed by the Court of Appeals is unpublished. Judge Conmy's Order of Clarification dated March 29, 2002 (Case No. A1-00-93) (App., *infra*, 18a) is unpublished.

JURISDICTION

The Order granting summary judgment by the Court of Appeals to the individual defendants was entered on July 10, 2003. A timely Petition for Rehearing and Rehearing En Banc was filed, which Petition was denied on September 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution are reproduced at App., *infra*, 32a-34a.

2. Section 2802 of Title 25 of the United States Code, §1983 of Title 42 of the United States Code, and the General Allotment Act of 1887 (Dawes Act), 24 Stat. 388 (current version at 25 U.S.C. §331, *et seq.*) are reproduced at App., *infra*, 35a-46a.

3. North Dakota Cent. Code 29-06.1-02 (1997) and Rule 7.2 of the North Dakota Rules of Court are reproduced at App., *infra*, 47a-49a.

STATEMENT

In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), six justices agreed that the Dawes Act, 24 Stat. 388 (1887), divested the tribes of the power to exclude non-members from their fee lands within a reservation. That holding followed the observation in *Montana v. United States*, 450 U.S. 544 (1981) that allotment dissolved tribal jurisdiction and the right to exclude feeholders from their lands. *Id.* at 560, n.9. In *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191 (1978), the Court held that tribes do not have criminal jurisdiction over non-Indians because of the Nation's "great solicitude that its citizens be protected...from unwarranted intrusions on their personal liberty." *Id.* at 210. There is a "general rule" or "presumption" that tribes lack civil jurisdiction over non-members. *Nevada v. Hicks*, 533 U.S. 353, 359, 383 (2001), *citing Montana v. United States*.

1. This case focuses on whether a federal BIA police officer and a county sheriff, who enforced an *ex parte* tribal court banishment order on a non-Indian, removing her from her home, all other fee lands and the public highways within a reservation, are protected from suit by quasi-judicial absolute immunity. To find that such immunity applies, the Court first must hold that tribal courts enjoy absolute judicial immunity for an order excluding a non-Indian from her home on fee land, which the Eighth Circuit held turns on whether a tribal court judge acts in the clear absence of all jurisdiction under *Stump v. Sparkman*, 435 U.S. 349 (1978). This Court has never extended absolute judicial immunity to tribal court judges in their dealings with non-member defendants. To the contrary, this Court pointedly noted in *Nevada v. Hicks*, it had "never held that a tribal court had jurisdiction over a non-member defendant." *Id.* at 358.

Because banishment is considered a criminal sanction and a "severe restraint on liberty" that triggers the right to habeas corpus relief, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 889 (2nd Cir. 1996), the tribal court clearly lacked jurisdiction to banish Margaret Penn from her home on fee land under *Oliphant*.

Moreover, the officers enforced the order by threatening to arrest Margaret Penn if she did not comply. If the officers threatened arrest in accordance with the tribal court order, this would place the order beyond the jurisdiction of the tribal court since the tribal court clearly lacks criminal jurisdiction over a non-member under *Oliphant*. Alternatively, if the tribal order did not provide for an arrest, the officers exceeded the available authority under the tribal court order and hence lost their right to claim absolute immunity by threatening arrest.

The federal BIA officer had no authority to arrest a non-member. While the county sheriff has authority to arrest non-Indians, he had no authority to do so under a tribal court banishment order. The authority of a BIA officer to enforce tribal law allows such enforcement only "subject to other applicable federal law." 25 U.S.C. §2802(c)(1). The question presented is whether the constitutional protections implicated by this Statute are rendered meaningless by the doctrine of quasi-judicial absolute immunity. That is, are federal and local law enforcement officers insulated from liability for violating the constitutional rights of a U.S. citizen because they are carrying out the edicts of a tribal court that is not subject to the requirements of the U.S. Constitution and a tribal political process in which a non-Indian cannot participate even as a resident. Penn submits that when enforcing a tribal court order, the BIA officer is exercising federal power and must assure the constitutional right of due process for a non-Indian defendant under 25 U.S.C. §2802(c)(1). *Compare*, *U.S. v. Lara*, 324 F.3d 635 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 46 (2003) (Sept. 30, 2003).

2. The events in this case occurred on July 24, 1998, on the Standing Rock Sioux Reservation in North Dakota. Two years earlier, Margaret A. Penn, a non-Indian, was fired as the tribal prosecutor after she filed a Petition for Writ of Mandamus/Prohibition alleging unethical conduct on the part of the Chief Judge of the Tribal Court. Penn in turn filed a wrongful termination suit in tribal court. Margaret Penn continued to live on fee land she rented from a non-Indian rancher, in Selfridge, North Dakota, and worked for a North Dakota non-profit corporation that operated a battered women's shelter. In the summer of 1998, recently terminated employees attempted to oust the director of the women's shelter, an individual that Ms. Penn supported. App., *infra*, 4a-6a; 10a-11a. Soon after, a former employee applied for an *ex parte* order banishing Margaret Penn from the Standing Rock Sioux Reservation. The unsworn petition stated that Ms. Penn had possession of a pistol, that she had made threats against several members of the tribe, and that she had filed a lawsuit against the Standing Rock Sioux Tribe. App., *infra*, 25a-28a.

Associate Tribal Judge Isaac Dog Eagle issued the *ex parte* "traditional Lakota banishment" order on July 24, 1998, "for a period of thirty days, at which time a hearing will be scheduled..." *Id.* The only accurate, non-conclusory allegation contained in the petition, however, was that Ms. Penn had filed suit against the tribe. Margaret Penn had given the pistol to the Sioux County Sheriff, Frank Landeis, for safekeeping several weeks before the petition was filed. This fact was made known to Judge Dog Eagle after he signed the order, but he told the officers to enforce it anyway. App., *infra*, 5a.

The order directed "any Police Officer" to "escort Margaret Penn from the Standing Rock Sioux Indian reservation boundaries." App., *infra*, 27a. There is no evidence of exigent circumstances. To the contrary, the officers knew Margaret Penn as the former prosecutor, knew she worked at a battered women's shelter, and believed she was peaceful and law abiding. App., *infra*, 55a, 73a. Before the

order was executed, BIA Officer Vettleson obtained the assistance of Sheriff Frank Landeis. Federal officers do not have the authority to arrest non-Indians, and Vettleson knew that Ms. Penn was not an Indian. App., *infra*, 74a, 70a. Only the Sioux County Sheriff had the authority to arrest non-Indians. App., *infra*, 64a. The boundaries of Sioux County are the same as the exterior boundaries of the Standing Rock Sioux Reservation in North Dakota. App., *infra*, 5a.

At around 2:00 p.m., BIA officer Vettleson and Sheriff Landeis went to the women's shelter, located on fee land, where Ms. Penn was at work. These uniformed, armed law enforcement officers enforced the order by threatening Margaret Penn with arrest if she did not comply. App., *infra*, 58a, 66a and 77a. Ms. Penn was also told that if she returned to her home in the town of Selfridge, she would be arrested, although her home was located on fee land. App., *infra*, 62a. The officers even made it clear that she could not drive on the public highways that cross the reservation. As Sheriff Landeis testified, she was not free to stay at her home or drive on public highways in Sioux County. App., *infra*, 67a. Ms. Penn, not wanting to go to jail, complied with the order, left her work and home, and did not return.

No hearing on the banishment order was ever scheduled by the Tribal Court. App., *infra*, 5a. Eventually the Standing Rock Sioux Tribe intervened and moved to vacate the banishment order. App., *infra*, 50a. The Tribal Court lifted the banishment order on September 14, 1998, fifty days after its issuance. App., *infra*, 29a. Ms. Penn tried to obtain relief by filing a *habeas corpus* action in federal district court under the Indian Civil Rights Act, 25 U.S.C. §1302, *et seq.*, but that suit became moot once the trial court lifted its banishment order. App., *infra*, 19a-24a.

Penn was deprived of the right to her home, possessions and employment for a period of two months. Ms. Penn never returned to live in her home in Selfridge, because of the fear generated by the banishment order and its enforcement by

federal and county officials. She had no one, including federal and local law enforcement, to protect her rights as a United States citizen even in her home on privately owned fee land.

3. Ms. Penn filed this suit in United States District Court against the parties involved in the service and enforcement of the order for violation of her constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution. Ms. Penn asserted claims under 42 U.S.C. §1983, direct constitutional violations and other claims. The individual law enforcement officers asserted claims of both quasi-judicial absolute immunity and qualified immunity, seeking protection from liability for their actions. The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1346(d).

4. The District Court denied their motions for summary judgment, App., *infra*, 10a, and defendants appealed. The jurisdiction of the Court of Appeals arose under 28 U.S.C. §1291. The Court of Appeals reversed the district court and dismissed the individual defendants, finding the officers enjoyed absolute immunity in enforcing the tribal court banishment order. App., *infra*, 1a. Although the Eighth Circuit found that there were "legitimate questions about [the] legality" of the tribal court banishment order, the court found it was "facially valid." App., *infra*, 9a. The Petition for Rehearing and Rehearing En Banc was denied. App., *infra*, 31a.

5. There are several reasons why quasi-judicial absolute immunity does not extend to this Tribal Court order. First, tribal courts are not courts of general jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001). Tribal courts are not subject to the United States Constitution, and are not subject to federal court appellate review. *Id.* The general rule grants absolute immunity to state and federal law enforcement officers carrying out state or federal court orders, unless there is a "clear absence of all jurisdiction," *Stump v. Sparkman*,

435 U.S. 349 (1978). That doctrine should not extend to tribal courts in this circumstance because there is a "presumption against" jurisdiction over non-members and their fee lands. *Hicks* at 383. Additionally, tribal court orders are considered the equivalent of the order of a "foreign nation" under North Dakota's Constitution and Rule 7.2 of the North Dakota Rules of Court. App., *infra*, 48a. The Sheriff was prohibited from enforcing a tribal court order unless it had been filed and recognized by the state court.

If the "clear lack of jurisdiction" test from *Stump v. Sparkman* is applied, the Supreme Court has ruled by solid majorities in *Brendale*, 492 U.S. at 424-437; *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Montana v. United States*, 450 U.S. at 560, n.9 that Indian tribes clearly lack jurisdiction to exclude non-members from access to fee lands. In *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), the court established that tribal courts lack jurisdiction over non-member activities on public highways which are used to access fee lands. The Tribal Court clearly lacked jurisdiction to banish Margaret Penn from her home on fee land.

6. Additionally, the Tribal Court's order banishing Margaret Penn was either a criminal punishment or an "unwarranted intrusion on her personal liberty" for which the Tribal Court lacked jurisdiction under *Oliphant*, 435 U.S. at 208 and *Duro v. Reina*, 495 U.S. 676 (1990). Banishment itself has been held to be a criminal sanction. *Poodry* and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Because the banishment was enforced by threat of arrest if Margaret Penn did not comply, either the Tribal Court authorized such arrest, making the banishment clearly criminal, or the officers exceeded their authority under the Tribal Court's order, negating their right to rely upon the directives of the Tribal Court for quasi-judicial absolute immunity. *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision conflicts with numerous decisions of this Court that have never recognized that a tribal court has jurisdiction over a non-member defendant. *Hicks*, at 358. *Brendale* and *Montana* both held that tribes lack jurisdiction to prohibit non-member access to their fee lands within the boundaries of a reservation. Because the Court of Appeals decision leaves U.S. citizens open to *ex parte* removal from their home without any effective remedy, the case is one of exceptional urgency and importance. Due process and other rights secured by the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution are at issue.

The statute under which the BIA officer acted, 25 U.S.C. §2802(c)(1), only gives the BIA officer authority to enforce tribal laws "subject to other applicable federal law." This is consistent with the constitutional limitations on the exercise of federal power. When federal officers act, even in enforcing a tribal court order, the power exercised is federal in origin and must, therefore, be transcribed by the limitations and requirements of the Constitution. The tribal court, however, is not subject to the Constitution. Because the tribal court does not have jurisdiction to either deny a non-Indian access to her home on fee land, or to restrain her personal freedom with regard to non-tribal lands under *Oliphant*, the tribal court clearly lacked jurisdiction over Margaret Penn when it attempted to banish her from her home on fee land. Since the tribal court clearly lacked jurisdiction in these circumstances, the tribal court did not enjoy absolute immunity, nor did the officers enforcing the tribal court order.

The Eighth Circuit's decision conflicts with the Second Circuit's decision in *Poodry*, which held that banishment is a criminal punishment. Even though the Eighth Circuit decision in this case found that Margaret Penn was free to seek habeas corpus relief under the Indian Civil Rights Act, a recognition

that there was a severe restraint on her liberty of the type that implicates *Oliphant*, the Court of Appeals failed to recognize the core issue that banishment from private lands is a criminal sanction, clearly beyond the jurisdiction of the tribal court.

A. The Court of Appeals Erred by Failing to Recognize that the Dawes Act Eliminated Tribal Jurisdiction Over Non-Member Access to Their Fee Land.

The Eighth Circuit erroneously concluded that the exceptions to the general prohibition against jurisdiction over non-members from *Montana* provided a colorable basis for jurisdiction so that it was "not apparent that Judge Dog Eagle was acting in the clear absence of jurisdiction". App., *infra*, 9a. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). To the contrary, the tribal court clearly lacked jurisdiction to exclude a non-member from her home on fee land. *See, Bourland* and *Montana*. *Compare, Stump v. Sparkman*.

The Appellate Court failed to apply the decision by six justices in *Brendale* that the Dawes Act, by opening reservation lands to sale to non-members, eliminated the power of the tribe to exclude fee owners from fee lands.

> [As a result of the Dawes Act] the Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the Reservation... [T]he tribal authority to exclude was necessarily overcome by, as Justice Stevens puts it, an "implici[t] grant" of access to the land. *Id.* at 424 (J. White Opinion for Plurality).
>
> A statute [Dawes Act] that authorizes the sale of a parcel of land in a reservation must implicitly grant the purchaser access to that property. *Id.* at 437 (J. Stevens Opinion).

The tribal court order banishing Margaret Penn from her home on fee land was facially invalid under *Brendale* and the Dawes Act.

Tribal jurisdiction over non-members is not inherent. *South Dakota v. Bourland*, 508 U.S. at 694. No federal grant of jurisdiction to the Tribal Court to banish a non-member from her home on fee land exists.

> The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large...Section 6 [of the Dawes Act specified] that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside." 24 Stat. 390. "[With the passage of the Indian Reorganization Act] Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints upon the ability of Indian allottees to alienate or encumber their fee patented lands, **nor impaired the rights of those non-Indians who had acquired title to over 2/3 of the Indian lands allotted under the Dawes Act."** *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-56 (1992). [emphasis added]

The ownership of the Standing Rock Sioux Reservation mirrors tribal reservation lands across the United States following the enactment of the Dawes Act. Of the 2.3 million acres in the original Standing Rock Sioux Reservation, approximately 1.4 million acres are fee or privately owned lands. App., *infra*, 82a. "Lands to which the Indians did not have any property rights were never considered Indian

Country." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (1999), *cert. den.* 530 U.S. 1261 (2000).

The loss of the power to exclude carried with it the loss of tribal regulatory authority. *Bourland*, 508 U.S. at 691, n. 11. Adjudicatory jurisdiction cannot exceed, and may not equal, regulatory authority. *Hicks* at 357-58,374.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); *Duro*, 495 U.S. at 696-97; and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 144 (1982) stand only for the proposition that tribes have the ability to "exclude non-Indians from Indian lands" or the "power to exclude [non-members from] tribal lands". *Merrion* at 141; *Duro* at 696-97, *citing Brendale* and *New Mexico*. "[A]llottment [dissolved tribal] jurisdiction . . . Congress could [not] have imagined . . . feeholders could be excluded from . . . their acquired property." *Montana* at 560, n.9. *Brendale* and *Bourland* affirmed this point.

The Eighth Circuit erroneously found that Penn "voluntarily involve[d] [herself] with tribal activities." App., *infra*, 8a. The Panel found she (1) lived on the reservation, (2) had worked for the tribe, (3) had a large civil suit against the tribe, and (4) had various other professional and personal ties to the tribe and its members. Under a summary judgment analysis, the facts are to be viewed most favorable to Penn, the non-moving party. *Martin v. Hendren*, 127 F.3d 720, 721 (8th Cir. 1997) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) [party opposing summary judgment benefits from all reasonable doubts].

Penn had not worked for the tribe for over two years. Suing for wrongful employment termination cannot create a consensual relationship or a jurisdictional basis for banishment. It is not "in for a penny, in for a Pound." *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Four hundred thousand non-members live on

reservations as a result of the Dawes Act.[1] This **divested**, not created, tribal jurisdiction. *See, County of Yakima, Brendale*, and *Yankton Sioux Tribe v. Gaffey*. Penn had no "professional tie" to the tribe; she worked for a North Dakota non-profit corporation. She worked with and provided services to tribal members and non-members alike. So does every grocer, doctor, hospital and rancher on a reservation. The hotel/trading post in *Atkinson* had tribal member employees, used tribal fire services and bought tribal crafts. Those are insufficient to create jurisdiction for regulatory, much less adjudicatory, purposes.

"We have never held that a tribal court had jurisdiction over a non-member defendant." *Hicks*, at 358, n.2.

> Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over non-members on non-Indian lands.

Id. at 360. The one "minor exception" was *Brendale* where this Court specifically held that the Dawes Act granted a non-member access to fee land in which he enjoyed a property interest and the tribe had no jurisdiction to exclude.

B. A Banishment Order is a Criminal Sanction and a "Severe Restraint on Liberty" Which Divests Tribal Jurisdiction Over a Non-Indian Defendant's Access to Her Fee Land.

The Court of Appeals' decision failed to recognize that the banishment order was a criminal sanction that operates as

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[1] Bureau of the Census, U. S. Department of Commerce, *1990 Census of Population, Social and Economic Characteristics, American Indian and Alaska Native Areas*, 3 (1990)

an intrusion on personal liberty. In American Indian cultures, banishment historically has been a criminal punishment.[2] Under this Court's decisions in *Oliphant* and *Duro*, tribal courts clearly lack jurisdiction to enforce a criminal sanction against a non-member.

The Eighth Circuit held that a tribal court "order excluding a non-member from a reservation is subject to review in federal district court under the habeas corpus provisions of 25 U.S.C. §1303," *citing Santa Clara Pueblo v. Martinez*, 439 U.S. 49, 67-68 (1978). But if the exclusion of a non-member from a reservation[3] is subject to habeas corpus review under the Indian Civil Rights Act, then the exclusion must be criminal in nature. The Second Circuit in *Poodry* held that "banishment has clearly and historically been punitive in nature" and a "severe restraint on liberty" which triggers the right to habeas corpus review. *Id.* 85 F.3d at 889, 895. Because habeas corpus proceedings are available to a banished non-member, banishment is a criminal sanction and the tribal court clearly lacks jurisdiction.

Tribal authorities "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Oliphant*, 435 U.S. at 208. The BIA officers admit that they also lacked criminal jurisdiction over Ms. Penn. App., *infra*, 70a, 79a and 80a. Non-members "are

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[2] *See, e.g.*, Stephanie Kim, "Sentencing and Cultural Differences: Banishment of the American Indian Robbers." 29 J. Marshall L. Rev. 239 (Fall, 1995); William C. Bradford, "Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution." 76 N. Dak. L. Rev. 551 (2000). Tribes still use banishment for the purpose of punishing criminals. *See,* Robert D. Cooter & Wolfgang Fikentscher, "Indian Common Law: The Role of Custom in American Indian Tribal Courts." 46 Am. J. Comp. L. 287 (1998) (Part I), 509 (Part II).

[3] The exterior boundaries of the Standing Rock Sioux Reservation encompass 3,593 square miles, a larger area than the states of Rhode Island and Delaware. App., *infra*, 82a.

embraced within our Nation's 'great solicitude that its citizens be protected... from unwarranted intrusions on their personal liberty.'" *Duro* at 692, quoting *Oliphant* at 210. Because banishment is a "severe restraint on liberty," *Poodry*, 85 F.3d at 889, this banishment order crossed the line drawn by *Oliphant* and *Duro* that tribal jurisdiction cannot "intrud[e] on [a non-member's] personal liberty." Enforcing the *ex parte* banishment as to Penn's home on fee lands was clearly unlawful for both the federal and tribal authorities.

C. By Threatening to Arrest Penn if She Failed to Comply with the Tribal Court Order, the Officers Lost Any Claim to Absolute Immunity.

If an officer carries out a judge's orders in a manner not specifically ordered by the judge, absolute immunity does not prevent further scrutiny of the officer's actions. *Robinson v. Freeze*, 15 F.3d at 109. The defendants are caught on the horns of a dilemma regarding the nature of the tribal court order and the arrest threat made to obtain compliance with the banishment order. If the Tribal Court order authorized the officers to arrest Margaret Penn, then there can be no question that the order was criminal in nature. If the officers went beyond the directive of the Tribal Court order by threatening arrest, they destroyed any claim to absolute immunity.[4] Here the Court of Appeals erred by finding that Penn did not complain about how the order was carried out, by ignoring the

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[4] Once Margaret Penn was threatened with arrest if she did not comply with the Tribal Court order, she had no alternative but to comply with the directives of the police officers. First, the officers were both in uniform and armed. App., *infra*, 15a; 57a. Additionally, the common law right to resist an unlawful arrest, recognized by the U.S. Supreme Court in *John Bad Elk v. United States*, 177 U.S. 529 (1900) has been abolished in most states, including North Dakota. N.D. Cent. Code 12.1-05-03 (1997); *see,* Andrew P. Wright, "Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?", 46 Drake L.Rev. 383 (1997).

critical significance of compliance coerced through threat of illegal arrest.

D. The BIA Officer Must Protect the Rights of a Non-Indian Under Federal Law When Enforcing a Tribal Court Order.

The Eighth Circuit erred by determining that a BIA officer and a county sheriff are in the same position when considering enforcement of a tribal court order as they would be when presented with a federal or state court order. Based on that misperception, the Appellate Court felt it was unfair to require these officers to make the "difficult choice 'between disobeying the court order or being haled into court to answer for damages.' *Patterson [v. Von Riesen],* 999 F.2d 1235, 1240 (8th Cir. 1993)." App. *infra*, 9a. That analogy is inapplicable. The federal officer's authority arises under 25 U.S.C. §2802(c)(1), which provides for enforcement of tribal law "subject to other applicable federal law." Congress did not direct BIA officers to enforce tribal law without question, but rather in plain language directed them to enforce tribal law **subject to other applicable federal laws**. The Dawes Act is such "other federal law" and *Brendale* held that the Dawes Act prohibited the exclusion of a non-member from fee land. A BIA officer cannot be charged with "disobeying the court order" when that order was facially invalid under federal law.

When a federal officer enforces a tribal court order pursuant to a federal statute, the source of power is the federal government. *Compare, U.S. v. Lara.* The BIA officer cannot rely on the tribal court, which is not subject to the Constitution, but must separately assure that the due process rights of the non-Indian are protected. The Constitution is plainly "other applicable federal law."

25 U.S.C. §2802(c)(1) codifies this requirement. The BIA officers in this case acknowledged they had discretion on carrying out the tribal court order. App., *infra*, 79a-80a.

As to Sheriff Landeis, he did not have authority to banish or arrest a non-Indian pursuant to a tribal court order. North Dakota law treats Indian tribes as "the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state." Rule 7.2 of the North Dakota Rules of Court. App., *infra*, 48a. The tribal court order must be filed with the state court and is subject to the notice of filing and stay of enforcement provisions established by North Dakota Statutes. *Id.* Sheriff Landeis had no authority to enforce a tribal court order, and he could not arrest anyone pursuant to a tribal court order except upon a tribal court warrant for a crime. *See*, N.D. Cent. Code 29-06.1-02 (1997) App., *infra*, 47a [only arrest if warrant for a crime and person is brought before state district court without delay]. A tribal court warrant to arrest a non-Indian, however, would clearly violate *Oliphant* and *Duro*.

E. The Policy Rationale for Absolute Judicial Immunity Does Not Support Extending that Doctrine to Tribal Court Orders Concerning Non-Indian Defendants.

While the Court of Appeals relied upon *Sandman v. Dakota,* 816 F.Supp. 448 (W.D. Mich.1992) for authority that a tribal court is entitled to the same judicial immunity as state and federal judges, that reliance is misplaced, App., *infra*, 7a. In *Sandman,* the tribal court clearly had jurisdiction under the Indian Child Welfare Act, 25 U.S.C. §§1901-1963. Plaintiff Sandman was an "Indian" since she pled guilty to a criminal charge in tribal court. *Sandman* does not address the doctrine of quasi-judicial absolute immunity for a BIA officer and county sheriff carrying out the *ex parte* banishment of a non-Indian from her home on fee land.

Tribal Courts are **not** courts of "general jurisdiction." *Hicks* at 357. "[I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action;..." *Stump* at 357, n. 7.

This Court has been "sparing" in recognizing absolute immunity, putting the burden of justification on its proponent. *Antoine v. Byers & Anderson*, 508 U.S. 429, 432-33 (1993). The Eighth Circuit extended the absolute judicial immunity doctrine under the mistaken belief that this was justified under *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). Tribal courts are not courts authorized by the Constitution, *see e.g. Hicks* at 366-67. Applying absolute judicial immunity to courts outside of our constitutional system and engrafting that immunity on police officers who must operate in accordance with our constitutional system is not justified by the policy underlying absolute immunity. Ms. Penn did not lose her right to full constitutional protections by living on fee land within a reservation. The Dawes Act opened reservation lands to settlement by citizens and by design those citizens brought with them local governments and full constitutional rights.

The Court of Appeals recognized that many of the policy reasons that underlie the grant of quasi-judicial absolute immunity are simply inapplicable to tribal courts. App., *infra*, 6a. The Eighth Circuit nevertheless swept aside the policy reasons that support absolute immunity for state and federal judges.

> Judges, all of whom take an oath to uphold the Constitution and are bound by codes of judicial conduct, are not often likely to act maliciously from the bench. Moreover, unscrupulous judges are not totally insulated from the public will. Even judges are subject to professional discipline, constitutional or statutory removal, or in more egregious cases, criminal prosecution under 18 U.S.C. §242, for willful deprivations of

constitutional rights. *Valdez v. City & County of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

None of these factors apply to tribal courts who are fully insulated from the political will of non-members.

The Court of Appeals relied on the "long-standing federal policy supporting the development of tribal courts" to encourage tribal self-government and self-determination, *citing Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 850 (8th Cir. 2003). Absolute immunity for banishing a non-Indian from her home on fee land does nothing to advance self-government or self-determination. The civil liberties of U.S. citizens cannot be exchanged for the policy of encouraging tribal self-government.

The fundamental problem with the Eighth Circuit's decision is its failure to recognize the profound policy implications of its holding. The Dawes Act intentionally opened up tribal lands for sale to non-members, and non-members were encouraged by federal policies to move on to those lands, open farms and businesses, interact with their neighbors, form political entities such as cities and counties, and live as though they resided anywhere else within the United States. *See, County of Yakima*, 502 U.S. at 254-56. The Appellate Court's decision means that any person who hires a tribal member, works with tribal members, provides goods or services in their business to tribal members or perhaps brings a lawsuit in tribal court to collect a debt from a tribal member, can be banished from their home without a hearing, by a tribal court order enforced by the federal BIA, and absolutely no one is accountable for the gross violation of due process and other constitutional rights.

Since the founding principle of the United States Constitution is that the just powers of government are only derived from the consent of the governed, granting such a power to a tribal government unaccountable to non-members

residing on fee lands within a reservation violates this core principle. *See, Yick Wo v. Hopkins*, 118 U.S. 356 (1886) which held that "sovereignty remains with the people" and is expressed through the "political franchise of voting" which secures all other rights. *Id.*, at 370. To say that a non-Indian banished from a reservation can seek habeas corpus relief is no consolation. By the time Penn got a habeas corpus hearing in federal court for her banishment, it was dismissed as moot, with no remedy for being deprived of her home for fifty days. The Eighth Circuit opinion will exacerbate relations between Indian and non-Indian neighbors, contrary to the goals of the Dawes Act. The Eighth Circuit's decision allows a U. S. citizen to be banished ex parte from her home by federal and county law enforcement officers with no meaningful remedy for the denial of due process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: December 5, 2003

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1731

Margaret A. Penn, Plaintiff/Appellee, v. United States of America; Department of Interior; Bureau of Indian Affairs; Bruce Babbitt, in his official capacity as the Secretary of Interior; Kevin Gover, in his capacity as Assistant Secretary for the Department of Interior charged with responsibility for the Bureau of Indian Affairs; Larry A. Bodin, individually and in his official capacity as Superintendent for the Standing Rock Sioux Agency; Richard Armstrong, individually and in his official capacity as Special Agent for the Bureau of Indian Affairs, Law Enforcement Services; John Vettleson, individually and in his official capacity as Captain of Police, Bureau of Indian Affairs; Defendants,	*	Appeals from the United States District Court for the District of North Dakota

Frank Landeis, Sheriff for Sioux County, *
in his official and individual capacities; *
Sioux County Sheriff's Department, *
*
Defendants/Appellants, *
*
Sioux County, ND; Sioux County Board *
of Commissioners; Larry Silbernagel, *
Chairman, in his official capacity; *
Debra Gullickson, Member, in her *
official capacity; David Volk, Member, *
in his official capacity, *
*
Defendants. *

No. 02-2267

Margaret A. Penn, *
*
Plaintiff/Appellee, *
*
v. *
United States of America; Department *
of Interior; Bureau of Indian Affairs; *
Bruce Babbitt, in his official capacity *
as the Secretary of Interior; Kevin *
Gover, in his capacity as Assistant *
Secretary for the Department of Interior *
charged with responsibility for the *
Bureau of Indian Affairs, *
*
Defendants, *

Larry A. Bodin, individually and in his official capacity as Superintendent for the Standing Rock Sioux Agency; Richard Armstrong, individually and in his official capacity as Special Agent for the Bureau of Indian Affairs, Law Enforcement Services; John Vettleson, individually and in his official capacity as Captain of Police, Bureau of Indian Affairs;

Defendants/Appellants,

Frank Landeis, Sheriff for Sioux County, in his official and individual capacities; Sioux County Sheriff's Department; Sioux County, ND; Sioux County Board of Commissioners; Larry Silbernagel, Chairman, in his official capacity; Debra Gullickson, Member, in her official capacity; David Volk, Member, in his official capacity,

Defendants.

Submitted: July 7, 2003
Filed: July 10, 2003

Before WOLLMAN, HEANEY, and MELLOY, Circuit Judges.

WOLLMAN, Circuit Judge.

Larry Bodin, Richard Armstrong, John Vettleson, and Frank Landeis appeal the district court's denial of their motion for summary judgment on the basis of absolute and qualified immunity. In addition to Federal Tort Claims Act claims not at issue in this appeal, Margaret Penn claimed that these four individual defendants violated her constitutional right to due process by serving and executing a tribal court order excluding her from the Standing Rock Sioux Indian Reservation. We reverse.

I.

Margaret Penn is one-eighth Turtle Mountain Chippewa Indian but is not enrolled in any Indian tribe, thus her status is that of a non-Indian. At all times relevant to this action Penn lived on land that was within the Standing Rock Sioux Indian Reservation but owned in fee by a non-Indian rancher. Penn is a lawyer who was chief prosecutor on the reservation until she was fired by tribal officials in August 1996. After her termination, Penn began working for Tender Hearts Against Family Violence, a nonprofit corporation serving the reservation. While employed at Tender Hearts, Penn filed a wrongful termination suit in tribal court against the tribe, the tribal chairman, the tribal council members, the chief judge, and others. In July 1998, recently terminated employees and members of the board of directors coordinated to oust Tender Hearts Director Kathy Smith. Penn was appointed by and a supporter of Smith. On July 24, 1998, Faith Taken Alive, the co-director of Tender Hearts, petitioned the Standing Rock Tribal Court for a "Traditional Custom Restraining Order." The petition alleged that Penn had a gun, had made threats against tribal officials, and had filed a multimillion dollar

lawsuit against the tribe. Without holding a hearing and relying solely on the uncorroborated, unsworn petition, Judge Isaac Dog Eagle issued a temporary restraining order excluding Penn from the reservation for thirty days. The July 24, 1998, order directed "any Police Officer" to "execute the Order of this Court and escort Margaret Penn from the Standing Rock Sioux Indian reservation boundaries." Although the order stated that a hearing would be scheduled at the conclusion of the thirty days, no hearing was ever held.

Bureau of Indian Affairs (BIA) Captain John Vettleson received the order from the tribal court on July 24. Pursuant to federal statute and regulation, the BIA's Division of Law Enforcement Services is responsible for enforcing federal "and, with the consent of the tribe, tribal law." 25 U.S.C. § 2802(c)(1); 25 C.F.R. §§ 12.21-12.22. Captain Vettleson consulted with BIA Standing Rock Superintendent Larry Bodin and BIA District Commander Richard Armstrong regarding the legality of the order. Each advised him to serve the order. Captain Vettleson requested the assistance of Sioux County Sheriff Frank Landeis in serving the order. The boundaries of Sioux County are coterminous with those of that portion of the Standing Rock Sioux Indian reservation lying within the state of North Dakota. Sheriff Landeis agreed to accompany Captain Vettleson while he served the order. Upon examining the order, Sheriff Landeis informed the BIA officers that Penn, fearing theft, had given to him for safekeeping the pistol mentioned in the petition. Captain Vettleson and Sheriff Landeis so informed Judge Dog Eagle, who repeated his direction to serve the order. Captain Vettleson and Sheriff Landeis then served Penn with the order at Tender Hearts. Penn indicated to them that she would comply with the order. The two officers escorted Penn to her home and helped her pack some of her belongings. Captain Vettleson advised her that if she returned to her home he

would be obliged to arrest her. Captain Vettleson and Sheriff Landeis then followed Penn as she drove her vehicle to the reservation boundary.

On August 31, 1998, Penn filed suit against the tribe, the tribal council, and several officials and members seeking habeas corpus relief and damages. On motion of the Standing Rock Sioux Tribe, the tribal court vacated the restraining order on September 14, 1998. Penn settled all claims against the tribe, its officials, and its members for $125,000. Penn subsequently filed this suit in United States District Court seeking damages against the parties involved in the service and enforcement of the order.

II.

The defendants appeal the district court's denial of their motion for summary judgment. The district court's denial of absolute immunity is immediately appealable, and our review is de novo. Martin v. Hendren, 127 F.3d 720, 721 (8th Cir. 1997). A judge is entitled to absolute immunity for all judicial actions that are not "taken in a complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. 9, 11-12 (1991) (per curiam). Penn urges us to deny the defendants' immunity claims by finding that tribal judges have no absolute judicial immunity and thus that no absolute quasi-judicial immunity can attach to the service or execution of tribal court orders. We recognize that tribal judges are insulated from removal or discipline by nonmembers and that tribal court orders may not be appealed to federal court. As Penn's petition demonstrates, however, an order excluding a nonmember from a reservation is subject to review in federal district court under the habeas corpus provisions of 25 U.S.C. §1303. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67-68 (1978). We have recognized "the long-standing federal policy supporting the development

of tribal courts" for the purpose of encouraging tribal self-government and self-determination. Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 850 (8th Cir. 2003). Accordingly, a tribal court judge is entitled to the same absolute judicial immunity that shields state and federal court judges. See Sandman v. Dakota, 816 F. Supp. 448, 452 (W.D. Mich. 1992).

Although we start with the presumption that qualified immunity is sufficient to protect government officials other than judges, Robinson v. Freeze, 15 F.3d 107, 108 (8th Cir. 1994), we have not hesitated to extend absolute immunity to other officials for acts taken pursuant to a facially valid court order. Martin, 127 F.3d at 721 (extending absolute quasi-judicial immunity to bailiffs for "acts they are specifically required to do under court order or at a judge's direction") (citation omitted); Patterson v. Von Riesen, 999 F.2d 1235, 1239-40 (8th Cir. 1993) (prison wardens); Duba v. McIntyre, 501 F.2d 590, 592 (8th Cir. 1974) (per curiam) ("A quasi-judicial form of immunity is extended to police and other court officers for purely ministerial acts where they do nothing other than perform orders issuing from a court.").

A judge does not lose immunity for all judicial acts taken in excess of jurisdiction. If that were the case, every appellate invalidation of an order based upon lack of jurisdiction would expose the trial judge to a suit for damages. Similarly, to subject police officers to suit for serving or executing a facially valid court order that is later held to be unlawful would require them to "act as pseudo-appellate courts." Valdez v. City and County of Denver, 878 F.2d 1285, 1289 (10th Cir. 1989). A police officer charged with service of a facially valid court order is entitled to carry out that order without exposure to a suit for damages. Patterson, 999 F.2d at 1240.

The court order at issue in this case includes both the

written order dated July 24, 1998, and Judge Dog Eagle's verbal directions to carry out the order despite the inconsistency regarding the pistol. The order was styled as a "Traditional Custom Restraining Order," which forbad Penn from all contact with the residents of the Standing Rock Sioux Nation for thirty days. It was signed by a tribal judge known to the defendants and attested to by the clerk of court. Consequently, it can be facially invalid only if it was issued in the "clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (citation omitted). Stump explained that "the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." Id.

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Id. at 357 n.7.

The court order relied in part on a mistaken assertion that Penn possessed a pistol. When Sheriff Landeis and Captain Vettleson informed Judge Dog Eagle of this error, they were directed to serve the order notwithstanding the error. We need not resolve whether Judge Dog Eagle actually had jurisdiction over this matter. A tribe's civil jurisdiction over nonmembers is limited but is broadest with respect to nonmembers who voluntarily involve themselves with tribal activities. Nevada v. Hicks, 533 U.S. 353, 358-59 (2001); Montana v. United States, 450 U.S. 544, 565-66 (1981) (protection of tribal integrity and nonmember's consensual relationship with tribe

can confer civil jurisdiction). Penn lived on the reservation, had worked for the tribe, had a large civil suit against the tribe, and had various other personal and professional ties to the tribe and its members. Considering only the face of the order and the evidence relating to the verbal reaffirmation of that order, it is not apparent that Judge Dog Eagle was acting in the clear absence of jurisdiction. A holding that the exclusion order was facially invalid merely because it was directed toward a nonmember would bring within its reach even those tribal court orders that are lawful under the highly technical analyses governing a tribal court's jurisdiction over nonmembers. Accordingly, we conclude that because the order was facially valid, the defendants were entitled to absolute quasi-judicial immunity for all acts prescribed by the order.

We recognize that the ex parte nature of the order, its county-wide scope, and its thirty-day pre-hearing duration raise legitimate questions about its legality. A determination of whether an order is unlawful, however, is an inquiry distinct from whether it is facially valid. Penn does not complain about the manner in which Captain Vettleson and Sheriff Landeis served and executed the order – her complaint is that they carried it out at all. Given the circumstances, we will not subject the officers to the difficult choice "between disobeying the court order or being haled into court to answer for damages." Patterson, 999 F.2d at 1240.

We reverse the district court's order and remand with directions to grant summary judgment on the basis of absolute quasi-judicial immunity to Bodin, Armstrong, Vettleson, and Landeis on Penn's individual capacity claims.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Margaret A. Penn,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A1-00-93
	)	
United States of America, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Before the Court are two motions for summary judgment. One filed by the United States on behalf of the Federal Defendants and one filed by the Sioux County Defendants. Both motions are based primarily on theories of absolute and qualified immunity. The parties agree that the Sioux County Commissioners should be dismissed because the Sioux County Sheriff is independently elected and not subject to control by the Sioux County Commissioners. The Court will so dismiss. The Court has previously dismissed and/or consolidated all the federal defendants such that only the United States remains. The federal defendants are sued under the Federal Tort Claims Act. The county defendants are sued under 42 U.S.C. § 1983 and various state law torts.

FACTUAL BACKGROUND

There is little dispute over the facts of this case which are unusual in the extreme. Plaintiff Margaret Penn is 1/8th Turtle

Mountain Chippewa. She is not an enrolled member of any Indian tribe or eligible for enrollment in any tribe. Her status is that of a non-Indian and nonmember of the Standing Rock Sioux Tribe. Plaintiff has a law degree from the University of Boulder. She has previously worked as a prosecutor on the Standing Rock Sioux Indian Reservation.

In August 1996 Plaintiff was fired from her job as prosecutor after getting involved in several disputes with Tribal officials. Plaintiff filed a civil lawsuit in Tribal Court based on her dismissal. She remained on the reservation and began working at Tender Hearts Against Family Violence, Inc., a nonprofit organization serving battered women. The Tender Hearts program was embroiled in some controversy of its own. On July 24, 1998, Faith Taken Alive, co-director of the Tender Hearts program, filed a "Petition For Traditional Custom Restraining Order" with the Standing Rock Tribal Court. The petition alleged Plaintiff had a gun and was making threats against Tribal officials and had filed a multimillion dollar lawsuit against the Tribe. On July 24, 1998, Associate Judge Isaac Dog Eagle issued an order for Plaintiff's temporary exclusion from the reservation. The banishment order was attested to by the Clerk of Tribal Court. The order was issued *ex parte* and without a hearing. The order provided a hearing would be held on the matter within thirty days but no such hearing was ever scheduled or held.

The banishment order was given to Bureau of Indian Affairs ("BIA") Captain John Vettleson for service. The service of tribal court orders is carried out by BIA officers as this is the stated policy of the Department of the Interior. Captain Vettleson consulted with superiors who told him to serve the order. Prior to serving the order Captain Vettleson attempted to contact the United States Attorney's Office but was unable to do so. Vettleson also called Sioux County Sheriff Frank Landeis and asked him to assist in service of the order.

The parties dispute whether the order was civil or criminal in its nature. This was not the first exclusion order Vettleson had served. While the order was issued as a civil order, the Plaintiff asserts it was in fact a criminal punishment.

Sheriff Landeis and Captain Vettleson knew the Plaintiff was not a Tribal member. The petition itself stated the Plaintiff was a nonmember. The gun referenced in the petition was actually in the possession of Sheriff Landeis and had been for several months. Plaintiff had given the Sheriff the weapon out of fear it would be stolen from her home in Selfridge where there had been a number of burglaries.

Sioux County is unique in that its borders coincide with the exterior boundaries of that portion of the Standing Rock Reservation which lie within North Dakota. Sheriff Landeis is the sole state law enforcement official in Sioux County. Sheriff Landeis regularly requests BIA law enforcement back him up and he returns the favor when BIA makes a similar request. Such cooperation is not unusual and is really a necessity when one considers the vast amount of territory to be covered, the overlapping jurisdictions and the very rural nature of the area.

The order was served on the Plaintiff at the Tender Hearts' office in Fort Yates. Plaintiff was allowed to retrieve some belongings at her residence in Selfridge and was then escorted to the reservation boundary. Plaintiff drove her own vehicle and was followed by Vettleson and Landeis in a police vehicle. Penn was informed by Captain Vettleson that if she failed to comply with the order she would be arrested. The complaint does not allege excessive force was used in service of the banishment order.

On August 31, 1998, Plaintiff commenced a Habeas Corpus action in this court seeking to have the banishment order declared illegal. On the same date the Plaintiff filed an administrative claim for damages with the BIA. Upon motion of the Tribe, Associate Judge Dog Eagle vacated the banishment

order on September 14, 1998. The federal habeas action was later dismissed. While that dismissal was on appeal, Plaintiff settled the matter and the Tribal Court action for $125,000. The current action was filed on July 21, 2000.

The essence of the Plaintiff's complaint is that the banishment order should not have been carried out because it clearly violated the law. The Plaintiff does not object to the manner in which the order was enforced, only that it was. Claims one through five are against the federal defendants under the Federal Tort Claims Act for failure to administer and monitor, failure to train, malicious prosecution, illegal arrest and seizure, and intentional infliction of emotional distress. Claim six is against the federal defendants under 42 U.S.C. § 1983. Claims six through eleven are state law claims against the county defendants. Those claims are for failure to administer and monitor, failure to train, malicious prosecution, illegal arrest and seizure, and intentional infliction of emotional distress. Claim twelve is against the county defendants under 42 U.S.C. § 1983.

ANALYSIS

I. Summary Judgment Standard

The standard for granting a motion for summary judgment is well-settled. A movant is entitled to summary judgment if he or she can "show that there is no genuine issue as to any material fact and that [he or she] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56©. The moving party bears the initial burden of showing the Court that, on the evidence before it, there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If the moving party meets its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); see also Celotex Corp., 477 U.S. at 324.

Those specific facts must generate evidence from which a jury could reasonably find for the nonmoving party; the mere existence of a scintilla of evidence supporting the nonmoving party's position is not sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The Court must construe all reasonable inferences in favor of the nonmoving party, and it may not properly grant summary judgment where the issue turns on the credibility of witnesses. Celotex Corp., 477 U.S. at 322-323.

II. Immunity

The Court will address the applicability of absolute and qualified immunity to both the federal and county defendants as a whole. The analysis is the same with the exception of the jurisdiction of the law enforcement officers. See Harlow v. Fitzgerald, 102 S.Ct. 2727, 2733 (1982).

There is a presumption in the law that qualified rather than absolute immunity is sufficient to protect public officials in the performance of their duties. Robinson v. Freeze, 15 F.3d107, 108 (8th Cir. 1994). Qualified immunity protects government official from liability for discretionary actions unless those actions violate clearly established constitutional rights. King v. Beavers, 148 F.3d 1031, 1034 (8th Cir. 1998).

Absolute immunity has been recognized for legislators in their legislative capacity and judges in their judicial functions. Harlow, 102 S.Ct. at 2732. Presumably, tribal court judges enjoy the same absolute immunity as their state and federal counterparts. Prosecuting attorneys, prison wardens and parole board members have also been recognized as enjoying absolute immunity for conduct flowing from their official duties. Patterson v. Von Riesen, 999 F.2d 1235, 1236 (8th Cir. 1993).

Courts have regularly held that public officials who act pursuant to a facially valid court order issued by a court of

competent jurisdiction enjoy quasi-judicial absolute immunity for enforcing the order. Id. at 1240. Officials acting outside their jurisdiction lose that immunity. Id. at 1239. Officials must not be required to act as "pseudo-appellate courts" second guessing judicial orders. Id. at 1241. If officials cannot carry out the orders and directives of judges without fear of being sued then the authority of the court will have been compromised and it will be unable to function effectively. Id. at 1240.

The banishment order was quite unusual. Facially valid does not mean lawful and an erroneous order may still be valid. Turney v. O'Toole, 898 F.2d 1470, 1473 (10th Cir. 1990). The order was issued as a civil order. The petition and order are couched in the terms of a restraining order and call for a hearing to be held in thirty days. The order was signed by a Tribal Judge and attested to by the Tribal Clerk.

Captain Vettleson and Sheriff Landeis were acting within their territorial jurisdiction. BIA policy calls for the service of process by BIA law enforcement officers. See 25 U.S.C. § 2802. Their actions took place on the reservation and in Sioux County. Vettleson and Landeis had served banishment orders in the past. Vettleson regularly served tribal court orders as part of his job and Landeis often assisted him. This was a professional courtesy necessary to an area with a maze of jurisdictions and few law enforcement officers of any type. To be sure, Landeis' presence was in his official capacity. He was in uniform and presumably armed. He clearly participated in the service of the order.

All of this having been said, the question remains as to the eligibility of the Sheriff and Captain Vettleson for either absolute or qualified immunity. The Court Order of banishment was issued by the Court of a sovereign separate and apart from that of the State of North Dakota or the county, although one whose geographical area within the State of North Dakota is the same as the political subdivision represented by the Sheriff.

Law enforcement agencies cooperate with each other as a matter of policy. The Sheriff of Sioux county does not, however, have any legal obligation to enforce or assist in the enforcement of any Tribal Court Order. Captain Vettleson, as a BIA employee, does have such an obligation.

Immunity should extend to good faith actions taken within the jurisdiction of the officer. As general rule, an officer carrying out a court order is clothed with immunity regardless of the idiocy of the order, but there has to be a limit to this policy. If the Tribal Court had ordered summary execution of Ms. Penn, surely Captain Vettleson and the Sheriff would not have carried out the order, although with the constitutional sanctity of the home of a citizen the action of summary eviction from the home and the County with absolutely no due process ranks right up there with summary execution.

I do not find the Order to be "facially valid." Ms. Penn is not a tribal member or even an "Indian" for purposes of Tribal Court jurisdiction. The facts recited by the parties indicate that the Court had issued other "banishment orders" in the past. A continuation of a clearly unconstitutional course of conduct does not create legitimacy. The Order would be unconstitutional even if directed toward a tribal member. It is inconceivable to me that any law enforcement officer, trained in the constitutional requirements of arrest and search and seizure, could believe that an *ex parte* order forcing someone from their home and County of residence for a minimum period of 30 days could be valid.

It may be argued, and probably will be so argued on appeal of this Order, that the denial of immunity will emasculate the effectiveness of law enforcement in that some determination of legitimacy of a court order will be required of the officers. I reject that argument in the belief that some determination of legitimacy is the clear duty of a law enforcement officer. "Just following orders" should not be an excuse when the order is

patently unconstitutional.

It is ordered:

1. The United States of America is hereby substituted as the sole defendant on behalf of all other named defendants with regard to the claims filed by the Plaintiff under the Federal Tort Claims Act. In all other respects, the motion of the Federal defendants is denied.
2. Sioux County and its Board of Commissioners, all sued in their official capacities, are dismissed as defendants as being without authority or ability to control or direct the action of the Sioux County Sheriff's Department and its Sheriff, Frank Landeis. In all other respects, the motions for summary judgment by Sheriff Landeis and the Sioux County Sheriff's Department are denied.

SO ORDERED

Dated this 6th day of March, 2002.

Patrick A. Conmy (signature)
Patrick A. Conmy, Senior District Judge
United States District Court

NOTICE OF ENTRY
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 6th day of March, 2002
Edward J. Klecker, Clerk
By: Kathy Schinler (signature), Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Margaret A. Penn,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. A1-00-93
	)	
United States of America, et al.,	)	
	)	
Defendants.	)	

ORDER OF CLARIFICATION

The parties have requested a clarification of this Court's Order dated March 6, 2002. The Court states the following in order to clear up any ambiguity:

1. The plaintiff's Bivens and §1983 claims against Bodin, Armstrong and Vettleson are preserved.

2. The United States has been substituted as the sole defendant only on the claims arising under the Federal Tort Claims Act.

SO ORDERED

Dated this 29th day of March, 2002.

Patrick A. Conmy (signature)
Patrick A. Conmy, Senior District Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Filed Jan 27 1999
Edward J. Klecker, Clerk
U.S. District Court - North Dakota

Margaret A. Penn,

Plaintiff,

A1-98-085

-v-

Isaac Dog Eagle, Associate Judge,
in his official capacity and personally;
et. al.

Defendants.

MEMORANDUM AND ORDER

I have been reviewing my admittedly less than great knowledge of literature to try to come up with some appropriate analogy to illustrate the absurdity of all elements of this action and of the facts underlying it. Alice in Wonderland or the Wizard of Oz come to mind, but the situation is so bizarre that perhaps something of Kafka or Sartre would be better.

Ms. Penn, the plaintiff, is not an enrolled tribal member or apparently eligible for such enrollment. She recites that she is 1/8th Chippewa in reference to parentage, but not eligible for enrollment. I therefore conclude that she is not an "indian", and that she certainly is not a member of the Sioux Tribe who claim sovereignty on the Standing Rock Reservation. Fort Yates, the seat of Tribal Government of the

Standing Rock Reservation, is located within the borders of the Sovereign State of North Dakota and the Sovereign Nation of The United States of America. The reservation itself is located in both North Dakota and the equally Sovereign State of South Dakota. In North Dakota, the reservation occupies an area also organized as Sioux County, a political subdivision organized and operated under the laws and constitution of the State of North Dakota.

All resident occupants of the area within the reservation located within the exterior boundaries of Sioux County are potential electors of officials of Sioux County, of officials of the State of North Dakota, and of other Boards, including probably the election of representatives to the Mosquito Vector Control Board, and of course Federal officials--the representative, two senators and the President of the United States. This potential to be an elector is not racially based, but is premised upon citizenship in the United States of America.

Only enrolled members of the Sioux Tribe are potential electors of the officials elected under the constitution of the Sovereign Sioux Tribe. This potential is racially based.

Ms. Penn, a non-lawyer, was at one time employed as a tribal prosecutor in Tribal Court. At the time of the major underlying incident, she was working for an advocacy organization in the areas of domestic violence and spouse abuse.

She is a party to litigation pending in Tribal Court involving her previous employment as a prosecutor, seeking either reinstatement or damages for an alleged wrongful termination.

Somehow, (and I refuse to schedule an evidentiary hearing to learn the details) Ms. Penn stepped on someone's toes and the result was an "Banishment Order" issued by "Associate Judge Isaac Dog Eagle" exercising "traditional authority".

The pleadings contain the following excerpts from the factual statement:

> "On July 24, 1998, at approximately 2:00 p.m., Petitioner, Margaret A. Penn, was served with an order directing that under a traditional banishment she be removed from the boundaries of the Standing Rock Sioux Indian Reservation by Frank Landis, Sheriff of Sioux County, and John Vettleson, Captain of Bureau of Indian Affairs Law Enforcement and supervising office of Standing Rock Sioux Tribal Police."
>
> "Sheriff Landis and Captain Vettleson directed petitioner that she must leave Tender Hearts Against Family Violence, Inc., where she was the only staff person on duty, and that they would accompany her to her home, allow her time to retrieve some possessions, and then escort her to the boundaries of the Standing Rock Sioux Indian Reservation from which she was excluded by order of the Standing Rock Sioux Tribal Court."
>
> "Petitioner asked Captain Vettleson if she returned to the Reservation would she be arrested and Captain Vettleson stated that his officers would be obligated to arrest her. Sheriff Landis and Captain Vettleson followed petitioner as she drove from Fort Yates to her home in Selfridge, North Dakota, then both men assisted petitioner in loading a few personal possessions into her vehicle. Sheriff Landis and Captain Vettleson, in a law enforcement vehicle, then followed petitioner as she left her home in Selfridge, North Dakota, and drove the approximately 30 miles to the exterior boundary of the Standing Rock Sioux Indian Reservation where they executed a u-turn and drove off and petitioner continued,

leaving the exterior boundaries of the Standing Rock Sioux Indian Reservation."

This statement would make a wonderful test question in a course on American Constitutional law. "please identify the constitutional rights of Ms. Penn violated in the above statement." Banished? From a political subdivision of a State? Without a hearing? Of a citizen of the United States? Evicted from her home under threat of arrest if she did not voluntarily comply? Evicted from her home with the cooperation and assistance of the Sheriff of Sioux County, apparently acting in his official capacity with the power of government behind him? I have the impression that as soon as someone with an appreciation of the rights possessed by all United States citizens learned of the "order" of banishment, it was somehow canceled by action of the Tribal Council. One wonders if the Sheriff and the BIA Police Captain would have carried out an order for summary execution by hanging if ordered by the "associate judge".

As stated, Ms. Penn has an action pending in Tribal Court. The Tribal Court of the Standing Rock Sioux Tribe is not an independent judicial branch, although on paper it looks good. In the past, the salaries of elected judges whose decisions have offended the council have been terminated by the tribal council, despite tribal constitutional prohibitions. As a "sovereign" who has not consented to suit in this court no recourse is available to the now unpaid judge other than through the same tribal court now possibly presided over by an "associate judge" appointed by the same Tribal Council--- who is getting the salary sought by the complainant.

It may perhaps show that I find the conduct towards Ms. Penn outrageous.

She sues in Federal Court, attempting to invoke the limited jurisdiction of this Court by reference to the Indian Civil Rights Act, 25 U.S.C. 1302 and 1303; 28 U.S.C. 1331,

Federal Question Jurisdiction; and 28 U.S.C. 1343, Civil Rights and Elective Franchise. Named as defendants are the "associate judge" Isaac Dog Eagle, officially and personally, the Tribe itself, the chairman of the Tribal Council and all of its member, named in their official capacities, the Tribal attorney, officially and personally, an administrative officer, officially and personally, and four individuals named in their personal capacity.

She requests that a writ of habeas corpus issue ordering the removal of any Tribal Court Order restricting her freedom to move at will through the various areas of the United States, including the Standing Rock Sioux Reservation. The Tribe and its officials respond by pointing out that she is already victorious on this issue in that the order has been rescinded and it is certainly not likely that anyone will attempt this again. They argue, and correctly, that any action based on the Indian Civil Right Act is subject to dismissal as the sole remedy of Habeas is now moot as no restriction on freedom presently exists. The prayer for relief also requests intervention in the action presently pending in Tribal Court, and a request that I find the United States District Court has jurisdiction to hear "any cause of action arising out of the issuance and execution of the banishment order."

The petition for the Writ of Habeas Corpus is now dismissed as having been mooted by the cancellation of the offending order, and the court finds that the balance of the requested relief is beyond the limited jurisdiction of this court under the pleading filed.

The petition is dismissed as to all named and served defendants, without prejudice to any claims or causes of action the petitioner may have which are separate and independent of the habeas remedy afforded by the Indian Civil Rights Act.

Dated this 27th day of January, 1999.
Patrick A. Conmy (signature)
Patrick A. Conmy
Judge of the District Court

Notice of Entry
Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27 day of Jan. 1999
Edward J. Klecker, Clerk
By: Deborah Thom (signature)
Deputy

STANDING ROCK SIOUX TRIBAL COURT
STANDING ROCK SIOUX RESERVATION

Faith Taken Alive,	)	
	)	Petition for
Petitioner,	)	Traditional Custom
	)	Restraining Order
v.	)	
	)	
Margaret Penn,	)	
	)	
Respondent.	)	

I Faith Taken Alive, of Mclaughlin, South Dakota, an enrolled member of the Standing Rock Sioux Indian Nation, residing within the exterior boundaries of the Standing Rock Sioux Indian Reservation do hereby petition this court for a traditional custom Restraining Order to be issued against Margaret Penn of Selfridge, North Dakota, a non-member of the Standing Rock Sioux Tribe, to restrain her from contact with the residents of the Standing Rock Sioux Nation under the following authority:

1. The Standing Rock Tribal Court has jurisdiction over this matter under Title I, Chapter 1, 1-107 "Civil Jurisdiction of the Standing Rock Sioux Tribal Court" which states, "The judicial power shall extend to all cases in law and equity arising under the Tribal Constitution, the customs or laws of the Tribe, and to any case in which the Tribe, a member of the Tribe, an Indian residing on the Reservation or a corporation or entity owned in whole or insubstantial part by an Indian shall be a party."

2. Standing Rock Sioux Tribal Code, Title II, Chapter 4, 2-401(c), which states, "In determining any case over which it has jurisdiction, the Standing Rock Sioux Tribal Court shall give binding effect to...(c) any applicable custom or usage of

the Standing Rock Sioux Tribe not in conflict with any law of the Tribe or of the United States..."

3. The Standing Rock Sioux Tribal Constitution, Article IV, Section 1(c) which states that it is the duty of the Tribe to promote and protect the health, education and general welfare of the members of the Tribe.

4. Standing Rock Sioux Tribal Constitution, Article IV, Section 1(g) "To encourage and foster the arts, crafts, traditions, Sioux language, and culture of the Sioux Indians.

5. Standing Rock Sioux Tribal Constitution, Article IV, Section 1(O) "To safeguard and promote the peace, safety, morals, physical and general welfare of members of the Tribe."

For the following reasons:

1. That the Petitioner purchased a pistol in Mobridge, South Dakota. The pistol was purchased under the name of the Petitioner and with the Petitioner's concealed weapons permit.

2. That Respondent is currently in possession of the pistol under the pretense of self protection.

3. That on several occasions the Respondent has expressed her interest in shooting the former Chief Judge of the Standing Rock Sioux Tribe.

4. That Respondent Margaret Penn made threats against several native american women, one a member of the tribe, one an enrolled member of the Chippewa Nation and the other an enrolled member of the Cheyenne River Sioux Tribe, of Standing Rock descent; of which two are residents of the reservation and the other is professionally involved with the reservation on a daily basis.

5. Said threats made were to make them answer to her personally for reporting her to the Tribal Administrator. Said threats were made to them while at their place of employment

at Tender Hearts Against Family Violence, Inc. office, located in Fort Yates, North Dakota within the exterior boundaries of the Standing Rock Sioux Indian Reservation.

6. That Respondent has repeatedly intimidated a member of the tribe at the member's former place of employment at Tender Hearts Against Family Violence, Inc., because of her working relationship with a former Special Judge of the Standing Rock Sioux Tribal Court.

7. That the Respondent currently has a multi million dollar lawsuit on file against the Standing Rock Sioux Tribe.

8. That forbidding contact with the Lakota Nation as a solution to problems such as this is a part of the culture and tradition of the Standing Rock Sioux Nation.

9. That protecting female members and leaders of the Lakota/Dakota nation from nonmember abuse is crucial to the tribes' survival.

ORDER

Based upon the foregoing petition and the Court being fully advised in the matter, and in accordance with the Traditional Tribal customs and laws and to protect the members of the Tribe and others residing on the reservation.

IT IS HEREBY ORDERED:
That the petition for restraining order is hereby granted for a period of thirty days, at which time a hearing will be scheduled.

IT IS HEREBY ORDERED:
That any Police Officer be directed to execute the Order of this Court and escort Margaret Penn from the Standing Rock Sioux Indian reservation boundaries.

IT IS FURTHER ORDERED:
That any Police Officer be directed to confiscate the 357 magnum pistol and place said pistol under the custody of the BIA Police Department.

Dated this 24th day of July, 1998

Isaac Dog Eagle (signature)
TRIBAL COURT JUDGE

ATTEST
LaVonne Running Bear (signature)
CLERK OF COURT

CERTIFICATE OF SERVICE

I HEREBY CRTIFY THAT I SERVED A TRUE AND CORRECT COPY OF THE ATTACHED PETITION FOR RESTRAINING ORDER AND RESTRAINING ORDER ON THE RESPONDENT IN THE ABOVE MATTER AS FOLLOWS:

PETITIONER	RESPONDENT
DATED SERVED 072498	DATED SERVED
SERVED BY	SERVED BY
Faith Taken Alive (signature)	_____
PETITIONER	RESPONDENT

STANDING ROCK SIOUX TRIBAL COURT
STANDING ROCK SIOUX RESERVATION

Faith Taken Alive,	)
	)
Petitioner,	)
	)
v.	)
	)
Margaret Penn,	)
	)
Respondent.	)

Order

Upon consideration of the Motion of the Standing Rock Sioux Tribe to Intervene and To Vacate Restraining Order, and all the facts and circumstances in this case, it is hereby

ORDERED, that the motion of the Standing Rock Sioux Tribe to intervene in this matter is hereby granted; and

FURTHER ORDERED, that the restraining order issued in this case dated July 24, 1998, and any extensions of that order, are hereby vacated; and

FURTHER ORDERED, that the respondent's presence on the Standing Rock Sioux Reservation shall be permitted; and

FURTHER ORDERED, that the parties and the BIA and Sioux County law enforcement officials be notified of the issuance of this order.

Isaac Dog Eagle (signature)
Isaac Dog Eagle,
Tribal Court Judge

ATTEST
Linda Anteel (signature) Clerk of Court

cc: Margaret Penn
Faith Taken Alive
Charles W. Murphy, Chairman
William R. Perry, Esq.

I, Linda Anteel, Clerk of Court of the Standing Rock Sioux Tribal Court, do hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears on file and of record in my said office.
Dated this 14 day of Sept, 98
Linda Anteel (signature)
Clerk, Standing Rock Sioux Tribal Court

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1731/2267

Margaret A. Penn,	*	
	*	Order Denying
Appellee,	*	Petition for
	*	Rehearing and
v.	*	for Rehearing
	*	En Banc
Frank Landis, etc., et al.,	*	
	*	
Appellants.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
(5128-010199)

September 11, 2003

Order Entered at the Direction of the Court:
Michael E. Gans (signature)
Clerk, U.S. Court of Appeals, Eighth Circuit

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Dawes Act (February 8, 1887)

24 Stat. 388-91

Forty-Ninth Congress of the United States of America; At the Second Session,

Begun and held at the City of Washington on Monday, the sixth day of December, one thousand eight hundred and eight-six.

An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;
To each single person over eighteen years of age, one-eighth of a section;
To each orphan child under eighteen years of age, one-eighth of a section; and
To each other single person under eighteen years now living, or who may be born prior to the date of the order of the

President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section:

Provided, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such

Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General

Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe

shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe, shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same

shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a

just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

[Endorsements]

25 U.S.C. §2802

Sec. 2802. - Indian law enforcement responsibilities

(a) Responsibility of Secretary
The Secretary, acting through the Bureau, shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this chapter.

(b) Division of Law Enforcement Services; establishment and responsibilities
There is hereby established within the Bureau a Division of Law Enforcement Services which, under the supervision of the Secretary, or an individual designated by the Secretary, shall be responsible for -

(1) carrying out the law enforcement functions of the Secretary in Indian country, and

(2) implementing the provisions of this section.

(c) Additional responsibilities of Division

Subject to the provisions of this chapter and other applicable Federal or tribal laws, the responsibilities of the Division of Law Enforcement Services in Indian country shall include -

(1) the enforcement of Federal law and, with the consent of the Indian tribe, tribal law;

(2) in cooperation with appropriate Federal and tribal law enforcement agencies, the investigation of offenses against criminal laws of the United States;

(3) the protection of life and property;

(4) the development of methods and expertise to resolve conflicts and solve crimes;

(5) the provision of criminal justice remedial actions, correctional and detention services, and rehabilitation;

(6) the reduction of recidivism and adverse social effects;

(7) the development of preventive and outreach programs which will enhance the public conception of law enforcement responsibilities through training and development of needed public service skills;

(8) the assessment and evaluation of program accomplishments in reducing crime; and

(9) the development and provision of law enforcement training and technical assistance.

(d) Branch of Criminal Investigations; establishment, responsibilities, regulations, personnel, etc.

(1) The Secretary shall establish within the Division of Law Enforcement Services a separate Branch of Criminal Investigations which, under such inter-agency agreement as may be reached between the Secretary and appropriate agencies or officials of the Department of Justice and subject to such guidelines as may be adopted by relevant United States attorneys, shall be responsible for the investigation, and presentation for prosecution, of cases involving violations of sections 1152 and 1153 of title 18 within Indian country.

(2) The Branch of Criminal Investigations shall not be primarily responsible for the routine law enforcement and police operations of the Bureau in Indian country.

(3) The Secretary shall prescribe regulations which shall establish a procedure for active cooperation and consultation of the criminal investigative employees of the Bureau assigned to an Indian reservation with the governmental and law enforcement officials of the Indian tribe located on such reservation.

(4)
(i) Criminal investigative personnel of the Branch shall be subject only to the supervision and direction of law enforcement personnel of the Branch or of the Division. Such personnel shall not be subject to the supervision of the Bureau of Indian Affairs Agency Superintendent or Bureau of Indian Affairs Area Office Director. Nothing in this paragraph is intended to prohibit cooperation, coordination, or consultation, as appropriate, with nonlaw enforcement Bureau of Indian Affairs personnel at the agency or area levels, or prohibit or restrict the right of a tribe to contract the investigative program under the authority of Public Law 93-638 (25 U.S.C. 450 et seq.) or to maintain its own criminal investigative operations.

(ii) At the end of one year following the date of establishment of the separate Branch of Criminal Investigations, any tribe may, by resolution of the governing body of the tribe, request the Secretary to reestablish line authority through the Agency Superintendent or Bureau of Indian Affairs Area Office Director. In the absence of good cause to the contrary, the Secretary, upon receipt of such resolution, shall reestablish the line authority as requested by the tribe.

(e) Division of Law Enforcement Services personnel; standards of education, experience, etc.; classification of positions

(1) The Secretary shall establish appropriate standards of education, experience, training, and other relevant qualifications for law enforcement personnel of the Division of Law Enforcement Services who are charged with law enforcement responsibilities pursuant to section 2803 of this title.

(2) The Secretary shall also provide for the classification of such positions within the Division of Law Enforcement Services at GS grades, as provided in section 5104 of title 5, consistent with the responsibilities and duties assigned to such positions and with the qualifications established for such positions.

(3) In classifying positions in the Division of Law Enforcement Services under paragraph (2), the Secretary shall ensure that such positions are classified at GS grades comparable to those for other Federal law enforcement personnel in other Federal Agencies in light of the responsibilities, duties, and qualifications required of such positions.

42 U.S.C. §1983

TITLE 42, CHAPTER 21, SUBCHAPTER I , Sec. 1983.

Sec. 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.D. Cent. Code 29-06.1-01. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Tribal arrest warrant" means any document issued by a court of a tribe in this state which authorizes a peace officer to take custody of a person.
2. "Tribe" means any of the federally recognized Indian nations, tribes, or bands in this state.

N.D. Cent. Code 29-06.1-02. Arrest with or without warrant.

1. A peace officer may arrest a person subject to a tribal arrest warrant if presented with the warrant and may arrest a person without a tribal arrest warrant upon probable cause to believe that the person is the subject of such a warrant. An arrest is authorized under this subsection only if the arrest warrant is issued for commission of a crime punishable as a misdemeanor under the applicable tribal ordinance or resolution.
2. The arrested person must be brought without unnecessary delay before the nearest available district judge.
3. The district judge shall issue an order continuing custody upon presentation of the tribal arrest warrant or, if the arrest is made without a warrant, upon testimony or affidavit showing probable cause to believe the person is the subject of such a warrant.

North Dakota Rules of Court, Rule 7.2
Recognition of Tribal Court Orders and Judgments

(a) **Policy.** Under Article VI, Section 3, of the North Dakota Constitution, the policy of the North Dakota Judicial System is that the Indian tribes in this state are considered the equivalent of foreign nations for the purposes of recognizing the orders and judgments of the tribal courts in this state. This policy and rule are to promote justice, to encourage better relations between the tribes of this state and the state of North Dakota, and to encourage reciprocal action by the tribes of this state. This policy and rule apply to courts of record of the state of North Dakota and courts in this state of the federally recognized Indian nations, tribes, or bands, including courts of Indian offenses.

(b) **Recognition.** The judicial orders and judgments of tribal courts within the state of North Dakota, unless objected to, are recognized and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state.

If recognition of a judgment is objected to by a party, the recognizing court must be satisfied, upon application and proof by the objecting party with respect to subsections 1 through 5, that the following conditions are present:

(1) The tribal court had personal and subject matter jurisdiction;

(2) The order or judgment was obtained without fraud, duress, or coercion;

(3) The order or judgment was obtained through a process that afforded fair notice and a fair hearing;

(4) The order or judgment does not contravene the public policy of the state of North Dakota; and

(5) The order or judgment is final under the laws and procedures of the rendering court.

(c) **Procedures.** Judgments filed for recognition under this rule are subject to the notice of filing, stay of

enforcement, and fee provisions established under NDCC Sections 28-20.1-03, 28-20.1-04, and 28-20.1-05.

(d) **Exception.** This rule does not apply to those orders or judgments to which federal law requires that states grant full faith and credit recognition.

[Adopted effective January 1, 1995.]

STANDING ROCK SIOUX TRIBAL COURT
STANDING ROCK SIOUX RESERVATION

Faith Taken Alive,	)
	)
Petitioner,	)
	)
v.	)
	)
Margaret Penn,	)
	)
Respondent.	)

Motion of the Standing Rock Sioux Tribe to Intervene and to Vacate Restraining Order

The Standing Rock Sioux Tribe hereby moves to intervene and to vacate the restraining order initially issued in this case on July 24, 1998. In support, the Tribe states as follows:

1. The Tribe has a significant interest in the outcome of this action. The Tribe, as sovereign, has a strong and unique interest in the proper allocation of power among the branches of Tribal government, and in the proper exercise of Tribal authority. Unless the Tribe's motion to intervene is granted, the position of the Tribe regarding the important issues implicated in this case will not be adequately represented.

2. The restraining order issued in this case on July 24, 1998 should be vacated for the following reasons:

A) The restraining order of July 24, 1998 was issued without notice. Under Tribal law, restraining orders without notice expire not more than 10 days after issuance. Code of Justice section 2-301. Since the July 24 order was issued more than 10 days ago, it has no further force or effect, by operation of Tribal law.

B) The restraining order of July 24, 1998 was issued without notice and without a prior or subsequent hearing, contrary to the due process requirement of the Tribe's Constitution. Constitution of the Standing Rock Sioux Tribe, Article XI, section 8.

C) Under the Tribe's Constitution, the Tribal Council is the lawmaking branch of Tribal government. Constitution of the Standing Rock Sioux Tribe, Article IV. The Tribal Council is empowered, among other things, to enact ordinances governing law and order and protecting the public welfare and safety on the Reservation. While the Tribal Council has considered enactment of an ordinance providing standards and procedures for excluding individuals from the Reservation, the Tribal Council has never enacted such an ordinance. In particular, the Tribal Council has never authorized the Tribal Court to grant ex parte exclusion orders at the request of an individual. Accordingly, the restraining order of July 24, 1998 was not authorized by Tribal law.

The Tribe respectfully requests that the Court enter the attached proposed order.

Respectfully submitted,
/s/ William R. Perry
William R. Perry
SONOSKY, CHAMBERS, SACHSE & ENDRESON
1250 Eye Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 682-0240

Attorneys for Standing Rock Sioux Tribe

SIOUX COUNTY SHERIFF'S DEPARTMENT

* COMPLAINT: Captain John Vittelson
* CASE NUMBER: 837
* ADDRESS: Fortyates North Dakota
* OFFENSE: Tribal Court Order
* PLACE OF OCCURRENCE: Fortyates North Dakota
* REPORT RECEIVED BY: 4620
* TIME: 1;00 pm
* DATE: 07-24-98
* HOW REPORTED: Telephone
* OFFICER ASSIGNED: 4620 & 5602
* DATE AND TIME OFFENSE COMMITTED: 07-24-98
* TIME OF INVESTIGATION: 1;00pm
* SUSPECT OR PERSON'S ARRESTED: Maggie Penn
* DETAILS OF OFFENSE:

On the afternoon of 07-24-98 Captain John Vittelson called my office and advised me that he wanted to talk with me and asked if I could come up to the police department and talk with him. When I arrived at the police department, I talked with John Vittelson and he gave me a copy of a tribal court order signed by Judge Issac DogEagle. this court order was to remove Maggie Penn from the standing rock indian reservation. In this court order it was stated that Maggie Penn had a 357 hand gun and that this gun was to be taken into police custody, This 357 handgun was at my house, the handgun was given to me abouet 2 to 3 months prior to this court order, Maggie had stopped me at the cenex station in Selfridge one day and she asked me if I would keep this gun because, at the time there where some breakins in Selfridge and that she didnt want someone to steal this gun so she brought the gun down to the house.

Captain John Vittelson talked with the his Supervisors and they informed him to go ahead and serve the court order and to remove Maggie Penn from the Tender Hearts building where she work,s and to also remove her from the Standing

Rock Indian Reservation. Captain John Vittelson and myself drove down to the Tender Hearts building and the captain served said court order on Maggie Penn. Maggie read over the court order and tryed to fax it to her attorney in Bismarck but was unable to get ahold of him. Maggie than locked the building up and Captain John Vittelson and myself followed her to her residence in Selfridge and she than packed a bunch of her belongings and they where loded into her vehicle and she than drove to the reservation line south of Brien North dakota and we followed her untill she was off of the reservation, at this time we turned around and went back to fortyates.

Frank Landeis (signature)
Frank Landeis (signature)

Subscribed and Sworn before me this 25th day of August, 1994
James O. Johnson (signature)
Notary Public
JAMES O. JOHNSON
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires May 21, 2003
(Notary Stamp)

JAMES O. JOHNSON, NOTARY PUBLIC
STATE OF NORTH DAKOTA (Seal)

Q. Okay. Tell me what kind of instances where you would accompany the BIA police.

A. If there wasn't any extra officers around and they needed assistance. Let's say there was one officer and he had to make several arrests, I would go with him to assist.

Q. As a backup, kind of?

A. Yes.

Q. Would it make a difference there whether the individual to be arrested was Indian or non-Indian in terms of your involvement?

A. Well, if they were non-Indian I'd take care of it.

Q. Did you ever call them in to back you up in the same kind of situation?

A. Numerous times.

Q. So if you were going to arrest a non-Indian you might call BIA to see if somebody could provide some backup. Is that a fair statement?

A. Yes.

Q. Any other instances other than an arrest where you would be asked to back up the BIA or they'd be asked to back up you?

A. No.

Q. Had you ever served any tribal court orders?

Not banishment orders, but had you served any tribal court orders?

A. No.

Q. Before July 24 of '98?

A. I don't believe so.

Q. During the years that you knew Margaret Penn before July '98, did you have any reason to believe that she wasn't law-abiding?

A. No.

Q. Did you believe that she was violent in any fashion?

A. No.

Q. Did you believe she represented a threat to the community?

A. No.

Q. Did you know whether Margaret Penn, prior to July 24 of '98, was an enrolled member of the Standing Rock Tribe?

A. Could you repeat that?

Q. Yeah. Did you know if Margaret was an enrolled member of the Standing Rock Tribe?

A. No, I thought she was a non-Indian.

Q. Okay. When you were called out that day by John Vettleson on July 24 of '98 –

A. Yes.

Q. -- where were you at when you got the call from Mr. Vettleson?

A. I believe I was in my office.

Q. And what did he say when he called you?

A. He just asked me if I could come up to the PD for a little bit.

Q. So you were driving up there. You really don't know why he needs you.

A. No.

Q. And when you got there who was there?

A. He wasn't in his office. As I went by – it would be the back doors to the police department, I seen him and Mr. Bodin standing outside, talking, so I went out and they were talking, and then John handed me the order. And as I read through it, I at that time seen the part in there about the pistol. I advised them at that time that she didn't have it, that it was given to me two or three months prior to that and that I've had it ever since.

Q. Was Larry Bodin there when you made that statement?

A. Yes, he was.

Q. So Mr. Bodin knew that she didn't have the pistol then, either.

A. Yes.

Q. And you said that they handed you a copy of the tribal court order. I'm showing you Deposition Exhibit 1. Is that the document that they showed you that day, sir?

A. Yes, it was.

Q. Now, were you in uniform that day?

A. Yes, I was.

Q. So after you told them that you'd had that pistol for two or three months, what did they say, if anything?

A. I believe John said that he'd like to inform the judge about that, and me and John Vettleson went over to the judge's office and told him that I've had the gun for two or three months already.

Q. Okay. Let's go back, before we leave the police station the first time here. Did you talk to -- do you remember anything else that either Mr. Vettleson or Mr. Bodin said while you were there?

A. John had asked Mr. Bodin if he should go ahead and serve the court order, and Mr. Bodin said, "Yes, serve it."

Q. And did you ask what John wanted you there for when you got there?

A. No.

Q. Did he tell you what he wanted you there

A. Maggie had read over the order and, to my best knowledge, she wanted to fax it to her attorney or get ahold of him. She couldn't get the fax to go through. She couldn't get him on the phone, and she then asked – I believe it was at this time – what would happen if she didn't obey the order, and John advised her that she could be arrested.

Q. Okay. Did you say anything during this process?

A. I believe – no.

Q. Did Maggie indicate that she was not going to cause any trouble?

A. Maggie had made the statement that – after she couldn't get ahold the attorney, she had asked us if she could get some of the records and files from Tender Hearts, and John said yes. And she says, "I'm just gonna comply with it and not cause any trouble."

Q. Okay. And this is while you're still at Tender Hearts; right?

A. Yes.

Q. And did you tell her that you weren't there to serve the order? Did you tell her that?

A. No.

Q. Did you tell her that you weren't going to arrest her?

A. No.
Q. Do you remember anything else being said by any of the three of you while you were at the Tender Hearts building?
A. I believe I walked outside. I was standing by my car for quite a while while Maggie and Officer Vettleson were inside the office there.
Q. Okay. And give me an estimate. How long were you standing outside before they came out?
A. Maybe 10, 15 minutes.
Q. And at that point in time you saw Officer Vettleson and Maggie Penn come out; is that right?
A. Yes.
Q. And what did you understand was going to happen next?
A. That she was going to be escorted to her residence and pick up some personal stuff and then escorted off the reservation.
Q. At that point in time did it seem like the situation was pretty much going to proceed pretty smoothly with Margaret Penn?
A. Yes.
Q. And so at that point in time you were no longer needed to assure that there wasn't going to be any disruptions between Ms. Penn and Mr. Vettleson;

right?
A. Could you rephrase?
Q. Sure. The situation seemed to be proceeding smoothly with Margaret Penn; right?
A. Mm-hmm. Yes.
Q. So you weren't needed anymore to make sure there was a safety issue with Margaret Penn and Mr. Vettleson anymore; isn't that true?
A. There wasn't a safety issue, but once you back an officer up you wait and do it until the incident is over.
Q. Oh, okay. So you still felt you had to provide the backup; is that right?
A. Yes.
Q. You indicated she was going to get some records of Tender Hearts. Did she and John carry something out of the Tender Hearts building at that time?
A. No. I believe Maggie just took them out.
Q. Okay. And what happened after she and John came out?
A. She got in her vehicle. I told John to pick me up at the SO, which is just maybe a block and a half from there. I parked my car, got in with John, and we followed her to Selfridge.

Q. Help me out. What's the SO?
A. Sheriff's office.
Q. Oh, okay. So you dropped your car at the sheriff's office.
A. Yeah.
Q. And you then got in John's squad and you followed Margaret Penn to her house.
A. Yes. Mm-hmm.
Q. And that was at –
A. Selfridge.
Q. Up to the point in time when she left the Tender Hearts office, while you were still inside with her, did you or Mr. Vettleson tell her that she was free to not comply with the tribal court order?
A. No.
Q. And was it the plan when you went there with Mr. Vettleson that you were going to accompany him while he not only served the order but escorted her off the reservation?
A. Yes.
Q. And what happened when you arrived at Selfridge?
A. When we arrived at Selfridge I believe John had to fill gas. We filled gas at Cenex and then went back to the residence.

Q. Did you go to her house first, or did you just stop on the way, if you remember?
A. I believe we stopped at her house first and then we left from there.
Q. Okay. And how far is the Cenex station from her house?
A. About three blocks.
Q. Okay. When you got back to her house, what was she doing?
A. She was loading up clothes and stuff in boxes and putting them in her vehicle.
Q. And did you and Mr. Vettleson help her do that?
A. Yes, we did. We helped her carry boxes out to her vehicle.
Q. Okay. Do you remember anything that was said while you were with Margaret Penn and Officer Vettleson at her home that day?
A. I believe Maggie had asked what would happen if she would come back to her residence, and at that time John said that he'd be obligated to arrest her, or his officers would.
Q. Okay. Did you tell her at that time that you wouldn't arrest her if she came back?
A. No, I didn't.

Q. How long was it from the time that you and Mr. Vettleson and Margaret Penn first arrived at her home and the time that she was all packed up and started to drive away?

A. Half-hour to 45 minutes or so, maybe a little bit longer.

Q. So what time of the day are we at now?

A. Maybe after 2:00.

Q. Okay. And how far is it from Fort Yates to Selfridge?

A. Seventeen miles.

Q. And then what was the route that she took after she left her home?

A. She went northbound on Highway 6 to Breien, which is the end of the Sioux County.

Q. And about how far is that from Selfridge?

A. Twenty-four, 25 miles; right in that area.

Q. So would it be fair to say – what time was this by now by the time you drop her at the – or she leaves Sioux County and you folks turn around at that point; right?

A. Yes.

Q. What time was that?

A. It must have been about 3:00.

Q. Now, the road from Fort Yates down to

Selfridge, what road is that? What highway?
A. Highway 24 and then Highway No. 6.
Q. Okay. Are those state highways, county highways?
A. State.
Q. On July 24, 1998, are you aware of any other human being that was prohibited from being on either of those highways other than Margaret Penn?
A. No.
Q. Now, is it your view as sheriff that you have jurisdiction over what happens on privately owned land on the Standing Rock Reservation?
A. Depending on the incident and who's involved.
Q. Okay. Do you believe you have jurisdiction if there's a criminal matter that involves a non-Indian no matter where it happens? Let's start with that. Within Sioux County, obviously.
A. Yes.
Q. And do you believe you have jurisdiction if it happens on privately owned land that involves a non-Indian? Would it be yes, same answer?
A. That's right.
Q. How about if it's an enrolled member of the Standing Rock Sioux Tribe and it's on privately owned

land?
MR. MILLER: Are you talking about a criminal matter?
MR. THOMPSON: Criminal matter; right.
THE WITNESS: No.
Q. (MR. THOMPSON CONTINUING) And in that instance what would you do?
A. Call BIA.
Q. If it was an emergency situation?
A. I could detain the subject until the BIA arrived.
Q. And that's the same thing they do for Sioux County if it's a non-Indian.
A. Yes.
Q. But you just simply keep that person there until the BIA can take over.
A. Right.
Q. Was there anything that Margaret Penn did when you were in Selfridge and she was loading her things in her vehicle at her home – during that time was there anything that indicated to you that she was not going to cooperate?
A. No. At one time she had said, "I'm just gonna go ahead and leave, and I'll get with my attorney and get this straightened out."

EXAMINATION BY MR. MILLER: arrest her for anything?
A. No.
Q. Why is that?
A. It wasn't my papers. It was tribal court papers. She was in violation of nothing of the State, so it had to have been John Vettleson that would have made an arrest, if there was any.
Q. If there was any.
A. Yes.
Q. And I think you've already indicated that there was no arrest made that day.
A. No.
MR. MILLER: I don't have any further questions
MR. THOMPSON: I have a couple more.
FURTHER EXAMINATION
BY MR. THOMPSON:
Q. You indicated that Maggie Penn voluntarily complied with the tribal court order; is that right?
A. Yes.
Q. She was also told that if she didn't comply she would be arrested, and Mr. Vettleson told her that; isn't that true?
A. Yes.
Q. And it was your understanding that Maggie

Penn was not free on July 24, 1998 once John Vettleson handed her the order. She wasn't free anymore to stay at Tender Hearts, was she?

A. No.

Q. She wasn't free to stay in her home, was she?

A. No.

Q. And she wasn't free to drive on the public highways in Sioux County, was she?

A. No.

MR. THOMPSON: No further questions.

MR. HAYDEN: I have nothing further.

MR. MILLER: I have nothing further.

It's up to you, Frank. Do you want to read and sign the deposition, or do you want to waive the reading and signing?

THE WITNESS: I'll waive it.

MR. MILLER: Okay.

(Concluded at 3:10 p.m., the same day.)

Q. Do you have authority as a North Dakota police officer to enforce North Dakota state laws outside of the Standing Rock Sioux Reservation?

A. No, I didn't have any special authority given. It was like Frank. We'd give out citations. Anytime there was anything serious to be done, we'd always contact the sheriff.

Q. Are you an enrolled member of any Native American tribe or band?

A. Yes, I am.

Q. Which one is that?

A. Turtle Mountain Chippewa.

Q. Did you have authority in July of 1998 to arrest individuals within the boundaries of the Standing Rock Sioux Reservation if they were not an enrolled member of the Standing Rock Sioux Tribe?

A. Under certain circumstances, like a DUI driver, we would have that authority.

Q. Emergency type –

A. Other than that, no.

Q. Okay. And what document or guideline explained that policy to you so you knew who you could arrest and not arrest?

A. We were in constant contact with Frank and we knew – we'd always discuss, you know, what he

wanted us to do. We didn't have any agreement for cross-deputization. As a matter of fact, the tribe had never given Frank any authority, but he would always assist us, even if it was Native American.

Q. I guess my question, Mr. Vettleson, was more aimed at: Was there some policy or guideline within the BIA, or the Standing Rock BIA department, specifically, that spelled out the limits of your authority in terms of arrests of individuals on the reservation?

A. There was no written policy.

MR. MILLER: There was what?

MR. HAYDEN: He said there was no written policy.

Does that include the BIA manual, if you know? Do you have access to the BIA manual?

THE WITNESS: The policy that he's referring to and what I understood was regarding state law.

MR. THOMPSON: No, I'm asking on any matter.

MR. HAYDEN: Any arrest authority whatsoever.

THE WITNESS: Okay. Then I misunderstood his question.

Q. (MR. THOMPSON CONTINUING) Okay. Let's start with any arrest authority whatsoever. Did you

have authority to arrest nonmembers of the Standing Rock Sioux Tribe in July of 1998 for any types of violations?

MR. HAYDEN: Could I – I don't mean to interrupt, but nonmembers obviously has significance as that term is used in the question, and it may be more appropriate to ask whether or not this person is either a Native American, otherwise known as an Indian, or otherwise. I think case law makes a distinction between that, as opposed to a member and a nonmember.

MR. THOMPSON: I did intend to get to that.

MR. HAYDEN: I'm sorry. I want to make sure that the witness clearly understands the question.

MR. THOMPSON: That's fine. Let's back up.

Q. (MR. THOMPSON CONTINUING) Did you have any policy or guidelines that you operated under as a BIA police officer in July of 1998 as to whether or not you had authority to arrest or detain an individual who was not Native American, whether under tribal law or state law?

A. I didn't have that authority. And, like I said, one of the exceptions would be in an emergency case where officers had run across a DUI driver, you know; and in that case, for reason of public safety,

you can't continue to leave a DUI driver driving down the road and kill somebody.

Q. What would you do in the instance of a DUI driver? Let's assume you saw someone driving down the highway in a clearly impaired state. What would your procedure be?

A. The procedures we had was exactly the same as the state. They would be arrested – or first given a test, the field sobriety test, to determine the extent of their intoxication, as far as field testing. Then they would be given a PBT, which is a field Breathalyzer test, which gives you a good indicator as to what level of alcohol they're at. And if they failed or scored a certain amount of points and failed, they would be arrested, detained, brought to jail and be given an Intoxalyzer. If they refused the Intoxalyzer, they would be also advised of the implied consent laws. So I mean the procedure was the same as it would be in the state, and the sheriff would be contacted that we'd have a non-Indian in our jail.

Q. How quickly would the officer try to reach Sheriff Landeis or his office to let him know that you had a non-Indian that you suspected of a DUI violation?

Duane. I'm not positive about it, if it's Duane.
Q. Last name was Eagle?
A. Eagle.
Q. And was Mr. Eagle a member of the Standing Rock Sioux Tribe?
A. Yes, he was.
Q. And when was the banishment order served on him?
A. The date, I can't really recall. It was quite a while – it was a while before Maggie Penn was served.
Q. You had indicated that Larry Bodin was your direct supervisor when you were the captain of police; correct?
A. Correct.
Q. And if Mr. Bodin wasn't available, who would you contact if you had a question?
A. If Mr. Bodin wasn't available, he had an acting superintendent in his place.
Q. Okay. Have you ever been given an order from the tribal court that you have declined to serve?
A. No, not that I can recall.
Q. When you received the July 24, 1998 order for Maggie Penn, did you believe that you had any

discretion on whether or not you went ahead and served that order?

A. No, I didn't.

Q. Did you believe you had authority to enforce the order?

A. Questionable. I don't know.

Q. Did you know Margaret Penn before July 24, 1998?

A. Yes.

Q. How long had you known Ms. Penn?

A. I believe about three or four years.

Q. And how did you come to know her?

A. She was the tribal prosecutor.

Q. Was she ever involved in trying cases where you were a witness as a police officer?

A. I believe she was.

Q. Did you understand that she was an attorney by education and training?

A. Yes, I did.

Q. Did you know where she lived in July of 1998?

A. No, I didn't. I knew she lived in Selfridge, but I didn't know where.

Q. You knew the town but not exactly where?

A. Yeah.

Q. And did you have any knowledge as to what her ethnic background was?
A. No.
Q. Did you know whether she was a member of the Standing Rock Sioux Tribe or not?
A. I didn't believe so.
Q. Did you know if she was an enrolled member of any other Native American tribe or band?
A. I didn't believe so.
Q. Did you have any reason, prior to July 24, 1998, to believe that Margaret Penn was anything but law-abiding?
A. Not before and after, no, I had no reason.
Q. All right. Did you think that she was violent or had a propensity for violence?
A. She had made a couple comments about a certain individual, that I wasn't sure if she really meant them or not.
Q. Which individual was that?
A. His name was Judge Swallow.
Q. Okay. And what were the comments you recall her making?
A. Some were womanizer and that – she really didn't care much for him, she didn't like him. And the exact comments, I can't remember.

Q. Do you know if Judge Swallow shared similar feelings for Margaret Penn, that he didn't really like her?

A. I never talked much with him, so I wouldn't know.

Q. Okay. Did you ever hear her make any threats against Judge Swallow?

A. Personally, no.

Q. You were aware that by July 1998 she was no longer the tribal prosecutor. Is that a fair statement?

A. Yes.

Q. Did you know before you got the order on July 24, 1998, that she was involved in working with the Tender Hearts program?

A. Yes, I did know.

Q. Okay. Did you have dealings with the Tender Hearts program from time to time in your role as captain of police?

A. Yes.

Q. I take it that you would involve that program if you had a domestic violence situation. Is that a fair statement?

A. Yes.

Q. Let's just talk about banishment in a

A. Not that I can recall.
Q. When you're in uniform as a police officer on Standing Rock, when does an individual have the discretion to decide if they will follow the directions that you will give them?
A. I'm not sure exactly what you mean by that question.
Q. All right. I'm just saying if you're carrying out your duties as an officer and you tell an individual to leave an area, for example, to come with you, do they have discretion as to whether or not they're going to comply with that order or that direction from you?
MR. MILLER: Well, I'm going to object to the question, because I think it's so general in nature, it wouldn't be fair for the witness to give an answer without more concrete facts.
THE WITNESS: Yeah, I believe you're right. You know, it depends on the circumstances on which you're working with.
Q. (MR. THOMPSON CONTINUING) Okay. So there may be instances where an individual doesn't have to follow your direction if you tell them to "Come with me." Is that true?
A. And if a person says that – say it's an

order, or something, and they fail to comply with that order –

Q. Yes.

A. -- then you warn them of the consequences, "Well, if you don't comply with the order, then I have to go back and report to the Court that you failed to comply with this order, and the Court will decide what to do with you at that point in time."

Q. All right. Now, let's go to the point in time that you arrive at Tender Hearts with Sheriff Landeis on July 24, 1998. Who was there when you arrived, sir?

A. I know there was me, Frank and Maggie. It seems to me there was somebody else in the office, but I can't recall who it was.

Q. And what did you say when you arrived?

A. Talked to Maggie, told her the Court issued an order and that she should take a look at it, and we're gonna serve the order on her. And she looked at it and I filled out the paperwork that the order was served. And I believe she asked, you know, what was the most serious thing that could happen to her, and I told her, "Well, you could be arrested." I believe that's what was said.

Q. This is still while you're at Tender Hearts?

A. I have a file that had a lot of different correspondence, and to say that they were all directives, no, it wasn't. I just had a compilation of different things that – meetings that I had, and I kept them in my folder and just stuck them in there.

Q. Okay.

A. And this was out of a meeting that we had.

Q. Okay. Within the Aberdeen office, whose duty would it be to keep and maintain the various directives that came down that might affect the BIA officers in the enforcement of their duties that would be subject to the Aberdeen office's jurisdiction?

A. Okay. It would have been the law enforcement officer in Aberdeen.

Q. And would that have been you at the time, sir, or would it be somebody else?

A. Directly. Indirectly, it would have been our law enforcement secretary.

Q. And who was that in 1998?

A. In 1998 it would have been Patricia Bosch, B-o-s-c-h.

Q. Are BIA officers directed in the performance of their duties by tribal court authorities?

A. They're directed by the bureau to work and enforce tribal law; yes.
Q. What you are describing, I would describe as a cooperative arrangement in which there's not a direct line of authority, but you're directed to work with them. Is that a fair statement?
A. Well, even if we didn't, we would still have that responsibility because of the trust responsibility that BIA maintains with the reservations, so it's kind of an ambiguous question, if you will. Some would say yes and some would say no. It's – the thing that usually gets thrown at us is trust responsibility, so that's a real big word. Either we did or we don't, you know, and we're always the good guys or the bad guys, whichever side you're on.
Q. I guess what I'm trying to get to is: If a tribal court issues an order, does the tribal judge have the authority to tell the BIA officer that "I want you to enforce this order"?
A. Yes, they do. Yes.
Q. Okay. And if he directs you to enforce the order, do you have any discretion as a BIA officer whether you're going to enforce that order?
A. Yes, you do.
Q. Okay. And what's the range of discretion?

A. I couldn't tell you. It would be on an individual basis. Discretion is – you know, we have officers out there who toe the line as far as black and white, and if somebody's in violation they take action. We've got some guys out there that don't do that. They just – it's a discretionary thing. That's kind of a real varied field. Options are open.

Q. Let's assume the tribal court issued an order directing the arrest of a non-Indian.

A. Mm-hmm.

Q. Would a BIA officer be obligated to carry that out?

A. No.

Q. And why not?

A. Because the Supreme Court said tribal courts do not have criminal jurisdiction over non-Indians.

Q. All right. And is there some – is that set forth in the enforcement handbook, do you know, that what we just talked about, that Supreme Court decision?

A. I don't believe – I don't believe so, but it does make reference to current laws that are applicable.

Q. Okay. Is there any written directive from

the Washington office that would talk about whether or not you have –

A. Yes, there is. It came out during the code decision that came out.

Q. Other than Exhibit 8, is there any written directive regarding the carrying out of civil orders from the tribal court and the application to a non-Indian?

A. I think that probably might be covered under their Standing Rock Tribal Law and Order Code as well.

Q. So one thing an officer might have to do would be to make sure that the Standing Rock Tribal Code allowed that order to be issued, if it's a civil order?

A. (Nods.)

MR. MILLER: I'm going to object. Lack of foundation.

MR. HAYDEN: I think there was an objection interposed. What was the objection?

MR. MILLER: Lack of foundation.

MR. HAYDEN: I think the question is vague, actually, and should probably be restated. I don't know that I even understood the question.

Q. (MR. THOMPSON CONTINUING) All right. Let's

www.standingrock.org/Demographics/Demographics.htm

Demographics

For more information contact:
Standing Rock Sioux Tribe
mark@westriv.com

DEMOGRAPHICS:
Tribal Agency Headquarters: Fort Yates, North Dakota 58538
Sioux County, North Dakota
Corson, Dewey and Zieback Counties, South Dakota
Federal Reservation: 1873
Population of enrolled members: 12,000
Reservation Population: 8,000
Density of 0.4 persons per square mile.
Labor force: 4,000
Unemployment rates: 59%
Language: Lakota/Dakota and English
Standing Rock Sioux (Lakota/Dakota Bands):
Hunkpapa, Blackfeet, Yanktonia, Cuthead

LAND STATUS:
Total Area: 2.3 million acres
Tribal Trust & Allotted: 503,607.50 acres
Fee & Private Owned: 1,395,536.27 acres
Reservoir taken area: 67,820.81 acres
Timber Reserve/Trust: 3,822.44
BIA/Trust: 1,026.39
Water: 5,916.65

LAND:
The Standing Rock Sioux Reservation is thirty-four miles south of Mandan, North Dakota. The reservation straddles the North Dakota and South Dakota border. The largest land base is on the South Dakota side of the reservation. The

reservation on the North Dakota side begins with the Cannon Ball River which runs along the north boundaries into Cedar Creek on the northwest end. The reservation border ends at the Perkins County and Adams County line in the west and the eastern side of the Missouri River is the east boundary of Standing Rock. The southern border of Stand Rocking Reservation ends with the Cheyenne River Sioux Reservation border. The total land area of the Standing Rock is 2.3 million acres and of that 503.607.50 acres is tribal owned. Our aboriginal land covers the James River North Dakota to the Platte River in Nebraska, to the Big Horn Mountains in Wyoming in the west, to the Missouri River in the east. The Black Hills is the center of our aboriginal lands. The land is an important part of the Lakota/Dakota people culture, history, traditions, and way of life.

STANDING ROCK RESERVATION EIGHT DISTRICTS

POPULATION PER DISTRICT:
Fort Yates, North Dakota 1,961
Porcupine, North Dakota 219
Kenel, South Dakota 259
Wakpala, South Dakota 707
Little Eagle, South Dakota 695
Mclaughlin, (Bear Soldier), SD 758
Bullhead (Rock Creek), SD 692
Cannon Ball, North Dakota 847

CLIMATE:
The average rainfall is 16-17 inches during the summer season. The growing season lasts three months, June to August. The snow fall averages from moderate to heavy for winter weather. The temperature in the summer is 80 degrees but will range from 69 degrees to 110 degrees from June to August. The area suffers from occasional drought in the

summer and severe blizzards in the winter. The spring and fall time is pleasant.

TRANSPORTATION:
The Lewis and Clark Trail or Historic Highway 1806 runs along the Missouri River. The 1806 runs into Highway 24 which runs along the communities of Cannon Ball, Fort Yates and back to 1806 on the South Dakota side. Highway 1806 runs along the communities of Kenel and Wakpala. Highway 6 runs from Mandan, North Dakota, to Highway 12, extends from Mobridge to Lemmon, South Dakota, and crosses east to west of the reservation. Highway 65 runs from Flasher, North Dakota, south by McIntosh, South Dakota. There are no major transportation facilities existing on the reservation. The charter buses and limousine services come to Prairie Knights and Grand River Casino Daily. The Greyhound bus service are located in north Bismark, ND, approximately 36 miles north of the reservation.

TRIBAL ECONOMY:
The Standing Rock Sioux Tribe's major economic occupation is cattle ranching and farming. The SRST has established various industries to employ the tribal people on the reservation and plans to develop more enterprises. We are making efforts to economically develop our reservation for the next generation. In the area of economic development, the Tribe currently operates the Prairie Knights Casino & Lodge, Prairie Knights Quick Mart, Grand River Casino, Standing Rock Farms, Standing Rock Sand & Gravel, Ambulance Service, Children's Home Project (Lake Oahe Group Home), Elderly Protection Center, Environmental Protection Office, Tribal Historic Preservation Office, and Repatriation Office. SRST is currently developing a Credit Union and Bank.

The districts also operate business such as the Bear Soldier Bingo, Big Foot Bingo in Little Eagle, and Bingo operations

in Cannon Ball, Fort Yates and Porcupine which supports their local districts. Bear Soldier has a grocery store, Cannon Ball has a convenience Store/gas station, Bullhead has a Trading Post and Little Eagle has a laundromat.

There are non-Indian owned businesses throughout the reservation, primarily in McLaughlin, Selfridge, Solen and Macintosh.

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(2)

Supreme Court, U.S.
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MAR 10 2004
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No. 03-829

In the Supreme Court of the United States

MARGARET A. PENN, PETITIONER

v.

LARRY A. BODIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether federal law-enforcement officers of the Bureau of Indian Affairs are entitled to quasi-judicial absolute immunity for executing of a tribal court order that excluded a non-Indian resident from the Standing Rock Sioux Tribe's reservation for 30 days.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 335 F.3d 786. The opinion of the district court (Pet. App. 10a-17a) and its subsequent clarification order (Pet. App. 18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2003. A petition for rehearing was denied on September 11, 2003 (Pet. App. 31a). The petition for a writ of certiorari was filed on December 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the period at issue in this case, petitioner lived within the reservation of the Standing Rock Sioux

Indian Tribe on land owned by a non-Indian. Although petitioner is one-eighth Turtle Mountain Chippewa, she is not an enrolled member of any Tribe. The Standing Rock Sioux Reservation straddles the border between North Dakota and South Dakota. Pet. App. 4a-5a.

When petitioner originally came to the reservation, she served as a tribal prosecutor. In 1996, however, she was fired from that position. She filed a civil action in tribal court to challenge her firing. Pet. App. 4a.

Petitioner then went to work for Tender Hearts Against Family Violence, Inc., a nonprofit organization serving battered women on the reservation. She became involved in a dispute with other Tender Hearts employees, including the organization's co-director, Faith Taken Alive. Pet. App. 4a.

In July 1998, Taken Alive filed a "Petition for Traditional Custom Restraining Order" in the tribal court, seeking to "restrain" petitioner "from contact with the residents of the Standing Rock Sioux Nation" by excluding her from the reservation. The petition alleged that petitioner was a threat to the safety of members of the Tribe and other reservation residents. Among other things, the petition alleged that petitioner had a gun, had threatened a former tribal judge and Tender Hearts personnel, and had filed a lawsuit against the Tribe. Pet. App. 4a-5a, 25a-27a. The tribal court granted the petition without giving notice to petitioner or conducting a hearing. The court issued an order directing "any Police Officer" to "escort [petitioner] from the Standing Rock Sioux Indian Reservation boundaries." The order provided that it was to remain in effect "for a period of thirty days, at which time a hearing will be scheduled." *Id.* at 5a, 27a.

2. The Division of Law Enforcement Services of the Bureau of Indian Affairs (BIA) is responsible for "the

enforcement of Federal law and, with the consent of the Indian tribe, tribal law" in Indian country. 25 U.S.C. 2802(c)(1); see 25 U.S.C. 2803 and (7) (Secretary of the Interior may charge BIA employees with "law enforcement responsibilities" and may authorize them to "perform any * * * law enforcement related duty"); 25 C.F.R. 12.21-12.22. As part of that responsibility, and as a matter of policy, BIA law-enforcement officers serve orders issued by tribal courts.

Respondent Captain John Vettleson, a BIA law-enforcement officer, was responsible for executing the tribal court order excluding petitioner from the reservation. Before doing so, Captain Vettleson consulted respondents Larry Bodin, the BIA Standing Rock Superintendent, and Richard Armstrong, the BIA District Commander, both of whom reviewed the order and advised Captain Vettleson to execute it. Pet. App. 5a.

Captain Vettleson sought the assistance of respondent Frank Landeis, the Sheriff of Sioux County, North Dakota, which contains the North Dakota portion of the reservation. Because Sheriff Landeis recalled that petitioner had given him the gun referred to in the petition for safekeeping, the officers brought that information to the attention of the tribal judge, who repeated his direction to execute the order. The officers served the order on petitioner at the Tender Hearts office. After allowing petitioner to retrieve some belongings from her residence, the officers followed her car to the reservation boundary. When petitioner asked what might happen to her if she returned to the reservation in violation of the order, Captain Vettleson responded that petitioner could be arrested. Pet. App. 5a-6a.

Petitioner brought a federal habeas corpus action to challenge the legality of her exclusion from the reserva-

tion. Because the tribal court subsequently vacated the order, however, the action was dismissed as moot. Petitioner settled her monetary claims against the Tribe, its officials, and its members for $125,000. Pet. App. 6a.

3. Petitioner brought this action in federal district court against, among others, the United States, Captain Vettleson, Superintendent Bodin, Commander Armstrong, and Sheriff Landeis. She sought damages against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and against the individual respondents in their personal capacities under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. 1983. See Pet. App. 6a, 13a, 18a.

The United States moved for summary judgment on behalf of the individual federal respondents on the ground, *inter alia*, that they are shielded from liability by quasi-judicial absolute immunity. Alternatively, the United States maintained that those respondents are entitled to qualified immunity because they did not violate any clearly established constitutional right. Pet. App. 4a, 10a.[1]

The district court denied the United States' summary judgment motion in relevant part. Pet. App. 10a-17a. The court acknowledged that "public officials who act pursuant to a facially valid court order issued by a court of competent jurisdiction enjoy quasi-judicial absolute immunity for enforcing the order." *Id.* at 14a-15a. The court further acknowledged that "[f]acially valid does not mean lawful and an erroneous order may still be valid" for purposes of quasi-judicial immunity. *Id.* at 15a.

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[1] A similar motion was filed on behalf of Sheriff Landeis, who has been separately represented throughout the proceedings.

The district court concluded, however, that the exclusion order in this case was not "facially valid." Pet. App. 16a. The court stated that the order was "patently unconstitutional" because it excluded petitioner from her place of residence "with absolutely no due process." *Id.* at 17a. Although the court observed that petitioner "is not a tribal member or even an 'Indian' for purposes of Tribal Court jurisdiction," the court added that "[t]he Order would be unconstitutional even if directed toward a tribal member." *Id.* at 16a.[2]

4. The Eighth Circuit reversed the denial of absolute immunity. Pet. App. 1a-9a.

While acknowledging "the presumption that qualified immunity is sufficient to protect government officials other than judges," the court of appeals explained that absolute immunity is extended "to other officials for acts taken pursuant to a facially valid court order." Pet. App. 7a. In particular, the court noted that "[a] police officer charged with service of a facially valid court order is entitled to carry out that order without exposure to a suit for damages." *Ibid.* The court declined petitioner's invitation to create an exception to that rule when the order is issued by a tribal judge, rather than a federal or state judge. *Ibid.*

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[2] The court also ordered that the United States be "substituted as the sole defendant on behalf of all other named defendants with regard to the claims filed by the Plaintiff under the Federal Tort Claims Act." Pet. App. 17a. The court subsequently issued an order clarifying that, notwithstanding the substitution of the United States with respect to petitioner's FTCA claims, petitioner's claims against respondents Vettleson, Bodin and Armstrong in their individual capacities had not been dismissed. *Id.* at 18a. Petitioner's FTCA claims against the United States remain pending and are not material to the issues raised in the certiorari petition.

Turning to the order at issue here, the court of appeals explained that the order, which "was signed by a tribal judge known to [respondents] and attested to by the clerk of court," would be "facially invalid only if it was issued in the 'clear absence of all jurisdiction.'" Pet. App. 8a (citing *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978)). The court found that the order was not facially invalid under that standard. *Id.* at 8a-9a. The court noted that, under this Court's decisions, Tribes have been recognized to possess a measure of civil authority over non-members, especially those who elect to "involve themselves with tribal activities." *Id.* at 8a-9a. Here, the court observed, petitioner "lived on the reservation, had worked for the tribe, had a large civil suit against the tribe, and had various other personal and professional ties to the tribe and its members." *Ibid.* Accordingly, the court concluded that, "[c]onsidering only the face of the order and the evidence relating to the verbal reaffirmation of that order, it is not apparent that [the tribal judge] was acting in the clear absence of jurisdiction." *Ibid.*

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and turns on the unique facts of this case. This Court's review is therefore unwarranted.

1. As this Court has recognized, judges are entitled to absolute immunity from liability under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. 1983 for their judicial acts, see *Stump* v. *Sparkman*, 435 U.S. 349, 346-347 (1978), and other officers are entitled to comparable immunity for acts that are intimately associated with the judicial process. See, *e.g.*, *Burns* v.

Reed, 500 U.S. 478, 487-492 (1991) (prosecutor is entitled to absolute immunity in connection with appearing in court and presenting evidence in support of a search warrant); *Briscoe* v. *LaHue*, 460 U.S. 325, 332 (1983) (police officer is entitled to absolute immunity in connection with giving testimony at a criminal trial); *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976) (prosecutor is entitled to absolute immunity for initiating a prosecution and presenting the State's case). In *Stump*, the Court explained that a judge is not deprived of absolute immunity merely "because the action he took was in error, was done maliciously, or was in excess of his authority." 435 U.S. at 356. "[R]ather," the Court continued, a judge "will be subject to liability only when he has acted in the clear absence of all jurisdiction." *Id.* at 356-357 (internal quotation marks omitted).

Applying those principles, the courts of appeals have recognized that, so long as a judge would be entitled to absolute immunity for entering an order, a law-enforcement officer is entitled to absolute immunity for executing it. The courts have repeatedly stated that the inquiry into whether the officer is absolutely immune in such circumstances turns on whether the court order is "facially valid." *Mays* v. *Sudderth*, 97 F.3d 107, 112-113 (5th Cir. 1996); *Roland* v. *Phillips*, 19 F.3d 552, 556 (11th Cir. 1994); *Patterson* v. *Von Riesen*, 999 F.2d 1235, 1240 (8th Cir. 1993) (citing cases); *Valdez* v. *City of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989); cf. *Erskine* v. *Hohnback*, 81 U.S. (14 Wall.) 613, 616-617 (1871).

That rule is correct. The threat of liability for enforcing facially valid orders would undermine the judicial process. Law-enforcement officers should not be required "to act as pseudo-appellate courts scrutinizing the orders of judges." *Roland*, 19 F.3d at 556 (quoting

Valdez, 878 F.2d at 1289). Instead, they should be entitled to rely on the judicial process to ensure the lawfulness of court orders. See *Patterson*, 999 F.2d at 1240 (officials "should not be required to make the Hobson's choice between disobeying the court order or being haled into court to answer for damages"). Similarly, a court should be able to expect that its order will be executed unless it is vacated by the court itself on reconsideration or is reversed by a higher court. Courts should not have their orders reviewed—and negated—by the officers charged with executing them. See *Coverdell* v. *Department of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987) ("The fearless and unhesitating execution of court orders is necessary if the court's authority and ability to function are to remain uncompromised.").

2. Petitioner does not take issue with the settled rule that law-enforcement officers are entitled to quasi-judicial absolute immunity when they enforce the facially valid orders of federal and state courts. But petitioner contends that the rule should not apply when an officer executes the facially valid order of a tribal court. See Pet. 17-20. Petitioner is mistaken.

Although petitioner asserts that "[t]ribal [c]ourts are not courts of 'general jurisdiction'" (Pet. 18), that fact does not distinguish tribal courts for present purposes from federal courts, which are likewise courts of limited jurisdiction, and from many specialized state courts. And, although petitioner also asserts that tribal courts are "outside of our constitutional system" (*ibid.*), that assertion is inaccurate and, in any event, is irrelevant to the question here.

To be sure, tribal courts, like state courts, are not "authorized by the Constitution" (Pet. 18), and tribal court judgments, unlike federal and state court judg-

ments, are not directly reviewable by this Court. Tribal courts nonetheless are not wholly outside the constitutional system. Congress has plenary power over the scope of tribal self-government, including the jurisdiction of tribal courts. And, although the Bill of Rights and the Fourteenth Amendment do not apply of their own force to tribal governments, Congress has required tribal governments to provide similar fundamental protections by statute. See 25 U.S.C. 1302. Congress has also provided that certain judgments of tribal courts may be challenged in a federal habeas proceeding, see 25 U.S.C. 1303—a provision that petitioner herself invoked to assert a challenge (which became moot) to the underlying tribal court order in this case.

More to the point here, tribal court judgments and orders enjoy the status and respect accorded to them by federal law. See *e.g.*, 18 U.S.C. 2265(a); 25 U.S.C. 1911(d); 25 U.S.C. 3106(c); see generally 25 U.S.C. 3601. BIA personnel, such as the federal respondents here, are charged by statute and regulation with certain law-enforcement responsibilities involving tribal law. See 25 U.S.C. 2802(c), 2803; 25 C.F.R. 12.21-12.22. Among those responsibilities is the execution of facially valid civil orders of tribal courts. In light of these federal statutory provisions affirming the status of tribal courts and providing for BIA officers to enforce their orders, it advances the federal statutory scheme to accord BIA officers who enforce tribal court orders the same immunities that are generally recognized for officers who enforce orders of federal and state courts.

Petitioner does not identify any other federal appellate decision that considered the question whether federal (or state) officers are entitled to absolute immunity for enforcing tribal court orders. There is consequently no split of authority on the issue and no reason to

suppose that the question arises with sufficient frequency to merit the Court's review.

3. The remainder of the petition is devoted to arguing that the tribal court order in this case was facially invalid—or, put differently, that the tribal court issued the order "in the clear absence of all jurisdiction," *Stump*, 435 U.S. at 357 (internal quotation marks omitted). See Pet. 10-17. But that claim is inextricably bound up with the unique facts of this case. Accordingly, even if there were any merit to the claim (which there is not), the claim is not one of general importance warranting the Court's resolution.[3]

The tribal court order—whatever its ultimate legality under tribal law (see note 3, *supra*) or otherwise—was not facially invalid. As the court of appeals observed, the order "was signed by a tribal judge known to [respondents] and attested to by the clerk of court." Pet. App. 8a. The order recited that it was entered "in accordance with the Traditional Tribal customs and laws," and for the legitimate purpose of "protect[ing] the members of the Tribe and others residing on the reservation." *Id.* at 27a. The order also stated that petitioner's exclusion was an interim measure and that a further hearing would be scheduled on the matter. *Ibid.* The order thus had sufficient indicia of regularity to justify respondents in executing it without risk of personal liability.

Although petitioner relies on decisions of this Court recognizing limitations on Tribes' authority over non-

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[3] It appears unlikely that the Standing Rock Sioux tribal court will issue another order of the sort at issue here. As the Tribe explained in seeking to intervene in the tribal court to obtain vacatur, the order "was not authorized by Tribal law" and was contrary to the tribal constitution. Pet. App. 50a-51a.

Indians, those decisions do not address whether a tribal court may enter a civil order excluding a non-Indian lessee from a reservation for a relatively short period of time.[4] See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001) (holding that a tribal court lacked the authority to adjudicate tort claims or Section 1983 claims against state law-enforcement officers who entered a reservation to execute a search warrant seeking evidence of an off-reservation crime); *South Dakota* v. *Bourland*, 508 U.S. 679 (1993) (holding that a Tribe lacked the authority to regulate hunting and fishing by non-Indians in an area taken by the federal government for a dam and reservoir project); *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that a Tribe lacked the authority to zone fee lands in a reservation's "open" area, but had the authority to zone property in reservation areas closed to the general public). Petitioner's reliance on *Hicks* is particularly misplaced because this Court did not issue its decision in *Hicks* until nearly three years after the events at issue here. *Hicks* could not have provided any guidance to the officers (or the tribal court) and would not be relevant even for qualified immunity purposes.

Indeed, while the Court has not had an occasion to rule on the extent of a Tribe's authority to exclude non-Indians who are perceived to pose a threat to reservation security, the Court has acknowledged the authority to exclude in at least some circumstances. See *Duro* v. *Reina*, 495 U.S. 676, 696 (1990) ("The tribes also possess their traditional and undisputed power to

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[4] Because petitioner is not a member of the Standing Rock Sioux Tribe or any other Tribe, the case has proceeded on the assumption that petitioner, despite her Indian heritage, is a non-Indian for present purposes. See Pet. App. 4a.

exclude persons whom they deemed to be undesirable from tribal lands."); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (stating that Tribes possess the "well established" power "to exclude nonmembers entirely" from their reservations); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141, 144 (1982) (observing that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands," and that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them"); see also *Strate* v. *A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997).

More generally, the Court has recognized that Tribes' civil authority over non-Indians is greatest when such persons "enter consensual relationships with the tribe or its members" or engage in "conduct threaten[ing] * * * the health or welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981). Petitioner entered into a consensual relationship with the Tribe by living and working on its reservation; she herself resorted to the tribal court to adjudicate her employment dispute with tribal officials. And as the text of the tribal court order indicates, petitioner was perceived to be a potential threat to the welfare of the Tribe's members and the entire reservation community.

At a minimum, in the absence of any square holding from this Court (or any other court) that a tribal judge is entirely without authority to issue an order temporarily excluding a non-Indian from a reservation, an order of the sort at issue here cannot be said to have been facially invalid or entered in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-357; cf. *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) (sustaining the authority of a tribal court to exclude a non-member permanently from a reservation).

Law-enforcement officers cannot, and should not, be required to postpone the enforcement of a tribal court order, if facially valid, while they analyze intricate questions of tribal authority of the sort that have long perplexed appellate judges and scholars.

Petitioner further contends that, although the tribal court order purported to be "civil" in character (Pet. App. 25a), the order should be understood as imposing a criminal penalty, which Tribes are without jurisdiction to impose on non-Indians. See Pet. 13-15. Whatever the merits of petitioner's argument, it does not call into question the validity of the order as a facial matter. Nor is there any reason to conclude that the order was intended to impose a criminal sanction. The stated purpose of the order was prophylactic, not punitive: "to protect the members of the Tribe and others residing on the reservation" from the risk of future harm by temporarily "restrain[ing] [petitioner] from contact with the residents" of the reservation. Pet. App. 25a, 27a.[5]

4. Finally, even if there were any question whether the federal respondents are entitled to quasi-judicial absolute immunity in this case, they would be entitled

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[5] Petitioner errs in asserting that the Eighth Circuit's decision in this case conflicts with the Second Circuit's decision in *Poodry* v. *Tonawanda Band of Seneca Indians*, 85 F.3d 874, cert. denied, 519 U.S. 1041 (1996). See Pet. 14. In *Poodry*, the court held that the permanent exclusion of tribal members from a reservation for acts of alleged "treason" was a criminal sanction for purposes of federal habeas review. See 85 F.3d at 888-889, 895-897. The exclusion order here contrasts with the one in *Poodry* in at least three respects. Petitioner's exclusion was not ordered for punitive purposes, she was not a member of the Tribe, and her exclusion was temporary. Nothing in *Poodry* suggests that an order of the sort involved in this case must be regarded as criminal in nature.

to qualified immunity. Qualified immunity shields government officials from personal liability so long as they do not violate "clearly established statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). It was hardly clear at the time of the underlying events in this case that the tribal court would lack the authority to issue the order or that respondents would violate petitioner's constitutional or statutory rights by executing the order. Accordingly, even if petitioner were to prevail in her challenge to the court of appeals' ruling on absolute immunity, the ultimate result in this case would be the same.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner does not request that the petition be held for disposition in light of *United States* v. *Lara*, No. 03-107 (argued Jan. 21, 2004). Nor would there be any reason for the Court to do so. *Lara* presents the question whether Congress validly restored the Tribes' sovereign authority to exercise criminal jurisdiction over members of other Tribes. Whatever the Court's resolution of that question, it would not affect the facial validity of the civil order in this case.